SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 119.

F. H. AYERS AND JOHN R. HALL, PLAINTIFFS IN ERROR,

vs.

A. E. WATSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

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1 The United States Circuit Court, 5th Circuit, in and for the Northern District of Texas, at Waco Sitting.

Be it remembered that — a term of the circuit court of the United States, 5th circuit, for the northern district of Texas, held at Waco, for the April term, A. D. 1886—Hon. Andrew P. McCormick, district judge, presiding—among other the following proceedings were had:

UNITED STATES OF AMERICA:

Circuit Court of the United States, 5th Circuit, in and for the Northern District of Texas, at Waco Sitting.

Hon. Andrew P. McCormick, dist. judge.

Be it remembered that on the 25th day of June, A. D. 1880, that the defendant-, Frank Ayers and others, filed their transcript of record and proceedings from the district court in and for the
2 county of Bell, northern district and State of Texas, cause numbered in the United States circuit court at Waco 34, and is in words, to wit:

(Endorsed, to wit:) U. S. circuit court, northern district of Texas. A. E. Watson, plaintiff, *vs.* Frank Ayers and others, defendants. No. 34. Trespass as well to try title as for damages. Filed in my office June 25th, 1880. J. H. Finks, clerk, by Wm. M. Sleeper, deputy.

Petition as follows:

THE STATE OF TEXAS, }
County of Bell. }

To the honorable district court of said county:

Your petitioner, A. E. Watson, who resides in the county of Falls, State of Texas, complains of John Anderson, who resides in the said county of Bell, and of Frank Ayers and John R. Hall, who are not residents of the State of Texas, all of whom are hereinafter styled defendants, and alleges that heretofore, to wit, on the
3 first day of August, A. D. 1877, your petitioner was seized of the following-described tract or parcel of land, lying on Cottonwood creek, in the aforesaid county of Bell, containing one-third of a league, and patented to the heirs of Walter W. Daws, dec'd, viz: Beginning at a stake from which a hackberry marked B. T. D. b'rs N. 36 E. 143 vrs., thence S. 71 E.; at 107 vrs. passes corner of the Kavanaugh survey, 3,767 vrs., a stake in west line of J. O. Rice survey, from which a double elm b'rs N. 26 W. 24 vrs.; another elm b'rs —.

Thence S. 19 W. with the line of said J. O. Rice's survey 2,550 vrs. to a stake from which a triple elm b'rs S. 19 E. 36 vrs.; thence N. 71 W. 3,767 vrs. to a stake on hill in prairie; thence N. 19 E. 2,550 vrs. to the place of beginning; which said tract of land peti-

tioner held as his own freehold and quietly possessed the same until afterwards, viz., on the 2d day of August, A. D. 1877, at which time the said defendants, with force and arms, broke and entered petitioner's close, viz., the tract of land before mentioned, and ousted and ejected your petitioner therefrom, and do still with force and
4 arms hold your petitioner ousted and ejected from said land, and have during their said unlawful occupation broken down petitioner's grass and dug up petitioner's said —, to his damage three hundred dollars.

Wherefore he sues, and prays that said defendants be cited to answer this petition, and that upon a final hearing petitioner have judgment for his costs and damages, and for a writ of restitution requiring the sheriff to place him in possession of said land; also prays for general relief; and, as in duty bound, will ever pray, &c.

GOODRICH & CLARKSON,
For Petitioner.

The defendants will take notice that this suit is brought as well to try title as for damages.

GOODRICH AND CLARKSON,
For Pl'ff.

THE STATE OF TEXAS, }
Bell County. }

L. W. Goodrich, being duly sworn, deposes and says that he is one of the attorneys for plaintiff in the petition, and that the defendants, Frank Ayers and John R. Hall, are not residents of the State of Texas.

L. W. GOODRICH.

5 Sworn to and subscribed before me on this the 29th day of Aug., 1877.

W. W. UPSHAW,
Cl'k D. C., Bell C.

Filed August 29th, 1877.

W. W. UPSHAW,
Cl'k D. C., B. C.

Process issued to the several defendants, and on the 5th October the following demurrer and answer filed:

Demurrer and Answer of John Anderson.

Suit Pending in District Court of Bell County. Oct. Term, A. D. 1877.

A. E. WATSON }
vs.
FRANK AYERS *et al.* }

The defendant, John Anderson, demurs to plaintiff's petition, and says that the same is insufficient in law—

1st. Because it does not state facts sufficient to constitute a cause of action against this defendant.

2d. Because it does not set out the facts constituting plaintiff's cause of action with sufficient certainty.

6 Wherefore he prays judgment of the sufficiency of said petition, and that he be dismissed with his costs, &c.

FAY AND MONTEITH,
Attorneys for Anderson.

And now comes the defendant Anderson, by his attorneys, and denies all and singular the allegations in plaintiff's petition, and of this he puts himself upon the country; wherefore he prays judgment, &c.

FAY AND MONTEITH,
Att'ys for Def't Anderson.

And, for further answer in this behalf, if such shall be necessary, defendant Anderson says that he has no interest in the premises described in plaintiff's petition, except as a tenant, and has never claimed any other than as a tenant, first of Sterling Smith, of McLennan county, State of Texas, and afterwards of Frank Ayers, of the county of ——, in the State of Mississippi, his codefendant herein, the first of whom was and the last of whom is the owner of Maximo Moreno eleven-league grant of land in Bell county, State of Texas; and that he holds under and acknowledges Frank

7 Ayers as his landlord, and Frank Ayers has made and acknowledged him to be his tenant, and that the said relation existed prior to the commencement of this suit and has continued to exist until the present time; that the tract of land in controversy is immediately south of the northern boundary line of the Maximo Moreno eleven-league grant, in said Bell county, in the northeastern corner of said grant, and the same, with the remainder of said Moreno eleven-league grant, is now and was at the time when such suit was instituted the property of said Frank Ayers, who holds through certain intermediate parties from David and Anna M. Ayers or the estate of said Anna M. Ayers, deceased, except that the estate of said Anna M. Ayers holds certain unpaid notes to secure the purchase-money for said grant.

Defendant Anderson further says that his said landlord, Frank Ayers, has bound himself to secure him in quiet and peaceable enjoyment of the said premises in controversy, and has to him and with him contracted and stipulated that he was possessed of

8 the entire fee in said estate, and was well able to defend the same against the plaintiff, as well as all other persons claiming or to claim the same.

Wherefore he prays that said Frank Ayers shall be required, as his landlord, to come in and defend this suit for him, and for such other and further relief as he is by law and equity entitled to, &c.

FAY AND MONTEITH,
Att'ys for Anderson.

The following answer filed on the 19th April, 1879, to wit:

Suit Pending in the District Court of Bell County, Texas. April Term, 1879.

A. E. WATSON
vs.
FRANK AYERS *et al.*

Now comes the defendants in the above-entitled cause, by their attorneys, and except to the plaintiff's petition and show the court that the matters and things therein alleged, in the manner and form therein set out, are insufficient in law to entitle said plaintiff to have and maintain his said action; and of this they pray the judgment of the court.

9

X. B. SAUNDERS,
W. T. RUCKER, &
A. M. MONTEITH,
Att'ys for Defendants.

And for answer, if any be required of them, the defendants deny all and singular the allegations contained in the plaintiff's petition, and say that they are not guilty of the wrongs, injuries, and trespasses therein alleged and charged against them; and of this they put themselves upon the country.

X. B. SAUNDERS,
W. T. RUCKER, &
A. M. MONTEITH.
Att'ys for Defendants.

And afterwards, on 28th April, A. D. 1879, the following amended original petition was filed, to wit:

In District Court, Bell County. Spring Term, 1879.

A. E. WATSON
vs.
FRANK AYERS *et al.*

Now comes plaintiff, A. E. Watson, by his attorneys, and filed this his first amended original petition, and avers that here-
10 tofore, to wit, on the 1st day of August, A. D. 1877, he (petitioner) was seized in fee of the following-described tract of land, in Bell county, State of Texas, about 15 miles N. E. by north from the three forks of Little river: Beginning at the S. W. corner of league No. 8 for the S. E. corner, from which an elm b'rs S. 43 E. 120 varas, another bears S. 26 W. 70 varas, thence N. 19 E.; at 1,170 varas and at 1,720 vrs. branches; at 2,375 varas the N. E. corner of this survey, from which a hackberry marked A bears N. 75 E. 23 varas, an elm marked B bears N. 14 W. 34 vrs.; thence N. 71 W. 940 vrs., and [at] 2,785 vrs. crossed branches; at 3,508 vrs. the N. W. cor-

ner, from which a hackberry marked C b'rs N. 35 E. 195 vrs., another, marked B, bears N. 36 E. 143 vrs.; thence S. 19 W. 500 vrs., a creek; at 2,375 vrs. a mound, the S. W. corner; thence S. 70 E., recrossing creek, 3,508 vrs. to the place of beginning; which said tract of land pl't'ff held and possessed as his own freehold estate until afterwards, to wit, the 2nd day of August, A. D. 1877, at which time the said def'ts, Frank Ayers and John R. Hall and John Anderson, with force and arms, broke and entered your petitioner's close, the
11 tract of land aforesaid and ousted and ejected pl't'ff therefrom, and do still, with force and arms, hold plaintiff ousted and ejected from said land, and have during their said unlawful occupation broken down petitioner's grass and dug up petitioner's soil, to his damage five hundred dollars.

Wherefore petitioner prays that said def'ts be cited to answer, and that upon final hearing petitioner have judgment for his said land, damages, and costs, and that a writ of possession issue requiring the sheriff to place petitioner in possession of said land; also prays for general relief.

GOODRICH AND CLARKSON,
Att'ys for Pl't'ff.

And afterwards, on the 29th day of April, A. D. 1879, the following 1st amended original answer was filed, to wit:

1st Amended Original Answer.

Suit Pending in the District Court of Bell County, Texas, to April Term, 1879.

A. E. WATSON
vs.
FRANK AYERS *et al.*

12 Now comes the defendants in the above entitled and numbered cause and, leave of the court being had, file this their first amended original plea and answer in lieu of their original answer and plea filed in this cause on the 19th day of April, 1879; and, first excepting to the plaintiff's petition, they show the court that the matters and things therein alleged, in the manner and form therein set out, are insufficient in law to entitle said plaintiff to have and maintain his said action, and of this they pray the judgment of the court that they go hence without day and recover all costs in this behalf expended, &c.

X. B. SAUNDERS,
A. M. MONTEITH, AND
W. T. RUCKER,
Def'ts' Att'ys.

Answer.

And for answer, if any be required of them, these defendants deny all and singular the allegations contained in said plaintiff's

petition, and say that they are not guilty of the wrongs, injuries,
and trespasses as therein alleged and charged against them,
13 and of this they put themselves upon the country.

X. B. SAUNDERS,
A. M. MONTEITH, AND
W. T. RUCKER,
Defendants' Att'ys.

Further Answer.

And for further answer, if any be required of them or either of them, the defendants, Frank Ayers, alleges and shows to the court that he is and was, at the time of the institution of this suit, the only just, legal, and equitable owner in fee simple of the following-described tract of land, situated in Bell county, Texas, viz., eleven leagues of land granted by the government of Coahuila and Texas to Maximo Moreno in the year 1833, said grant having field-notes as follows, viz., situated on the left margin of the river San Andres, below the point where the creek called Lampasas enters said river on its opposite margin, and having the lines, limits, boundaries, and landmarks following, to wit:

Beginning the survey at a pecan (nogal) fronting the mouth of the aforesaid creek, which pecan serves as a landmark for the first corner, and from which 14 varas to the north 59° west there is a
14 hackberry 24 in. dia., and 15 varas to the south 34° west there is an elm 12 in. dia, a line was run to the north 22° east 22,960 varas, and planted a stake in the prairie for the second corner; thence another line was run to the south 70° east; at 8,000 varas crossed a branch of the creek called Cow creek; at 10,600 varas crossed the principal branch of said creek, and at 12,580 varas two small hackberries serve as landmark for the third corner; thence another line was run to the south 20° west, and at 3,520 varas crossed the said Cow creek, and at 26,400 varas to a tree (palo) on the aforesaid margin of the river San Andres, which tree is called in English "box elder," from which 7 varas to the south 28° west there is a cottonwood with two trunks, and 16 varas to the south 11° east there is an elm 15 in. dia.; thence following up the river by its meanders to the beginning point, and comprising a plane area of eleven leagues of land or 275 millions of square varas.

And this defendant further alleges and shows the court that the land described in the plaintiff's petition and claimed by him,
15 said plaintiff, under some pretended patent from the State of Texas to the heirs of one W. W. Daws, deceased, is embraced within the boundaries of said eleven-league grant and in conflict with said eleven-league grant, which is an elder and superior title to said pretended patent from the State of Texas to the heirs of W. W. Daws, dec'd; all of which this defendant is ready to verify. Wherefore, the premises considered, he asks for judgment against said plaintiff that he take nothing by his said suit, and that said

pretended patent be canceled and held for naught, and for all costs, and for general and special relief, &c.

X. B. SAUNDERS,
A. M. MONTEITH, AND
W. T. RUCKER,
Att'ys for Defendant, F. H. Ayers.

And the defendant, John Anderson, for further answer, alleges and shows to the court that he is occupying the said Maximo Moreno eleven-league grant as the tenant of his codefendant, Frank Ayers, and more especially 100 acres of said eleven-league grant, in-
16 cluding his improvement where he resides, is held by him under said Maximo Moreno eleven-league title, said 100 acres fronting on the west side of Cottonwood creek, and to run back N. 71° W. from said creek, so as to include the improvements of this defendant. This defendant alleges and shows to the court that he had been in possession of said land for a long period before the date of the institution of this suit, holding the same adversely and in good — for a period of more than twelve months before the date of the institution of this suit, and that he has made permanent and valuable improvements upon said land during the time he has held possession of the same in good faith, as aforesaid, of great value, viz., of the value of one thousand dollars; all of which this defendant is ready to verify.

The premises considered, he says that said plaintiff ought not to recover anything against this defendant, and he asks for judgment against said plaintiff for all costs of this suit, &c.; but if the court should hold that said plaintiff is entitled to recover against
17 him and his landlord and codefendant the land aforesaid, then this defendant asks for a judgment against said plaintiff for the value of his improvements, made in good faith as aforesaid, and for all costs and general and special relief, &c.

X. B. SAUNDERS,
A. M. MONTEITH, AND
W. T. RUCKER,
Att'ys for Defendant, John Anderson.

Agreement of attorneys for both parties, filed April 14th, 1879, as follows, to wit:

A. E. WATSON
vs.
FRANK AYERS *et al.*

In this cause it is agreed, for the purpose of a trial, that the plaintiff may read in evidence certified copy from the land office of the patent to the heirs of W. W. Daws, dated Sept. 16th, 1850, and it is admitted that plaintiff has all the title vested in said heirs by virtue of said patent. It is also agreed that def'ts may read in evidence land office translated copy of the Maximo Moreno eleven-
18 league grant issued in 1833, and it is admitted that defend-

ants have all the title vested in said Maximo Moreno by virtue of said grant.

The object of this agreement is to relieve parties of the necessity of deraigning title from said original grantees.

April 14th, 1879.

GOODRICH AND CLARKSON,
Att'ys for Plaintiff.
X. B. SAUNDERS,
W. T. RUCKER, AND
A. M. MONTEITH, *Att'ys for Def'ts.*

Be it remembered at the regular April, A. D. 1879, term of the district court of Bell county, Texas, the following orders were made and the following proceeding had, to wit:

A. E. WATSON
vs.
FRANK AYERS *et al.*

Defendant- demands a jury.

A. E. WATSON
vs.
FRANK AYERS *et al.*

Plaintiff has leave to file first amended original petition.

19

A. E. WATSON
vs.
FRANK AYERS *et al.*

Defendants have leave to file first amended original answer.

And afterwards the following entry appears on the minutes of the court, to wit:

Verdict and Judgment.

A. E. WATSON
vs.
FRANK AYERS *et al.*

APRIL 29TH, A. D. 1879.

This cause coming on to be heard on the 29th day of April, A. D. 1879, came the parties, by their attorneys, and announced ready for trial; thereupon came a jury of twelve good and lawful men, to wit, J. D. McMahon and eleven others, who were duly impaneled and sworn to try said cause, and, after hearing the evidence, the argument of counsel, and the charge of the court, retired to consider of their verdict, and on the 30th day of April, 1879, returned into open court and announced to the court that they could not agree; whereupon a mistrial is had and jury discharged and cause continued.

20 And afterwards, on the 16th April, A. D. 1880, the following admission of defendants was filed in the district court of Bell county, to wit:

Admission of Defendants.

Suit Pending in District Court of Bell County. April Term, A. D. 1880.

A. E. WATSON
vs.
FRANK AYERS *et al.*

It is agreed and admitted by the defendants, for the purpose of this trial at this term of the court, that A. E. Watson, plaintiff in this cause, is entitled to all the right, title, and interest granted by the State of Texas to the heirs of Walter W. Daws on September 16th, A. D. 1850, said land patented being one-third of a league, described in said patent No. 542, vol. 8, and which said land is described in plaintiff's petition; but defendants say that said one-third of a league of land so patented as aforesaid to the heirs of Walter W. Daws is covered by the grant of the government of Coahuila and Texas to Maximo Moreno of eleven leagues of land, as set forth more fully in defendants' petition; which said eleven-
21 league grant is an older and superior title to that of plaintiffs, and the title to which is in the defendants in this cause.

X. B. SAUNDERS,
W. T. RUCKER,
F. H. SLEEPER, AND
A. M. MONTEITH,
Att'ys for Defendants.

2nd. Order and verdict as follows:

Be it remembered that afterwards, to wit, the 19th day of April, A. D. 1880, this cause went to trial, and the jury returned into open court and announced that they could not agree; whereby a mistrail was had and the jury discharged.

Motion to Remove.

And afterwards, to wit, April —, 1880, the defendant- moved the dist. court of Bell county to remove this cause to the Federal court in and for the northern district of Texas, in words as follows, to wit:

Motion to Remove Cause to Circuit Court of United States for the
22 *Northern District of Texas, at Waco.*

In District Court, Bell County, Texas, at Spring Term, A. D. 1880.

A. E. WATSON
vs. } No. 1240.
FRANK AYERS *et al.*

To Hon. Charles J. Jennings, special judge, presiding:

Your petitioner, Frank H. Ayers, who is a citizen of Jackson county, State of Mississippi, and defendant in this cause, respectfully shows that the plaintiff in this suit is a citizen of the State of Texas, and this defendant was at the date of the institution of this suit a citizen as aforesaid of said State of Mississippi; that this is a suit between citizens of different States, and the amount in controversy in this suit exceeds in value the sum of five hundred dollars, and there can be a final determination of the controversy in this suit, so far as he is concerned, without the presence of the other defendants as parties in this cause. Wherefore he prays your honor that he be permitted to remove said cause for trial, together with copies of all papers therein, to the circuit court of the United States for
23 the northern district of Texas at its next term in the terms of the law; and as in duty bound, &c.

F. H. AYERS,
By SAUNDERS, RUCKER,
MONTEITH, & SLEEPER,
Att'ys.

Order on motion to remove cause granted.

Motion to Remove Cause to Circuit Court of U. S. for Northern District of Texas.

A. E. WATSON
vs. } No. 1240.
FRANK AYERS *et al.*

On this the 23rd day of April, A. D. 1880, this motion coming on to be heard, and the matters and things therein contained be- fully understood by court, it is ordered and decreed by the court that the said motion be, and it is hereby, granted.

Bond for Removal of Cause from Bell County to U. S. Circuit Court, Northern District of Texas.

24 Suit Pending in District Court of Bell County. April Term, A. D. 1880.

A. E. WATSON
vs.
FRANK AYERS *et al.* } No. 1240.

Know all men by these presents that we, F. H. Ayers, as principal, and —— —— and —— ——, as sureties, are held and firmly bound unto A. E. Watson, plaintiff in the above-entitled cause, in the sum of one hundred and fifty dollars; for the payment of which, well and truly to be made, we do hereby bind ourselves, our heirs, executors, and administrators, forever, jointly and severally, firmly by these present, conditioned that the said F. H. Ayers shall well and truly enter in the circuit court of the United States for the northern district of Texas, at its next session, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in said cause.

Witness our hands and scrolls for seals this 20th day of April, A. D. 1880.

F. H. AYERS. [SEAL.]
W. S. RATHER. [SEAL.]
G. M. McWHIRTER. [SEAL.]

25 Approved the 20th day of April, A. D. 1880, and filed the 20th day of April, A. D. 1880.

W. P. BLACKBURN,
D. C., Bell Co.

The United States Circuit Court, 5th Circuit, in and for the Northern District of Texas, at Waco Sitting.

Be it remembered that — a term of the circuit court of the United States, 5th circuit, for the northern district of Texas, held at Waco, for the October term, A. D. 1880—Hon. Andrew P. McCormick, district judge, presiding—among other the following proceedings were had:

MONDAY MORNING, *Octo. 11th*, 1880.

Court met pursuant to adjournment.

Present: The Hon. Andrew P. McCormick, judge, presiding, and the officers of court—U. S. att'y, marshal, and clerk.

A. E. WATSON
vs.
FRANK AYERS *et al.* } No. 34.

On the 8th day of October, A. D. 1880, came the plaintiff
26 and the defendant-, by their respective attorneys; and there-

upon came a jury of twelve good and lawful men, who were duly impaneled, tried, and sworn to try this cause, to wit: 1, C. C. McCulloch; 2, Tony Hoeffner; 3, E. Harlan; 4, J. H. Morrison; 5, J. K. Procter; 6, A. J. Moore; 7, Jas. F. Edrington; 8, A. E. Osborne; 9, T. J. McQueen; 10, M. D. Wynne; 11, V. B. Ritter; 12, W. Sedberry; and the jury, having heard the evidence, the argument of counsel, and the charge of court, retired to consider of their verdict, and on this the 11th day of October, A. D. 1880, the jury came in open court and reported that they could not agree upon a verdict; whereupon they were discharged from further consideration of the case and a mistrial adjudged; and it was thereupon ordered that the case be continued on that account.

And afterwards, to wit, on April 30th, 1886, the following entry appears on the minutes of the court:

FRIDAY, *April 30th, A. D.* 1886.

Court met pursuant to adjournment.

Present: The Hon. Andrew P. McCormick, judge, presiding, and the officers of court—U. S. att'y, marshal, & clerk.

27 A. E. WATSON *vs.* FRANK AYERS *et al.* } No. 34.

APRIL 29TH, 1886.

On the 26th day of April, 1886, this cause being called for trial, the parties—plaintiff, A. E. Watson, and defendant, F. H. Ayers—appeared and announced ready for trial, and the defendant, John R. Hall, failed to appear; and thereupon came a jury of twelve good and lawful men, to wit, C. M. Hubby, J. H. Torbitt, W. T. Robinson, F. L. Carroll, W. S. Heard, Cliff Jackson, F. B. Williams, J. R. Bell, R. K. Lee, J. T. Forney, Geo. Horn, and J. W. Brooks, who were duly empanneled, selected, and sworn, who, after hearing the evidence, the argument of counsel, and charge of the court, retired on this 29th day of April, 1886, to consider of their verdict, and, after due consideration, returned into open court the following verdict, to wit:

"We, the jury, find for the plaintiff.

J. W. BROOKS, *Foreman.*"

It is therefore ordered and adjudged by the court that the plaintiff, A. E. Watson, do have and recover of and from the said defendants, F. H. Ayers and John R. Hall, the following-described
28 tract of land lying on Cottonwood creek, in Bell county, in the northern district of Texas, to wit: Beginning at a stake from which a hackberry marked B. T. D. b'rs N. 36 E. 143 varas, thence S. 71 E.; at 107 vrs. passes corner of the Kavanaugh survey, 3,767 varas a stake in west line of J. O. Rice survey, from which a double elm bears N. 26 W. 24 vrs., another elm b'rs —; thence S. 19 W. with the line of J. O. Rice survey 2,550 vrs. to a stake, from

which a triple elm b'rs S. 19 E. 36 vrs.; thence N. 71 W. 3,767 vrs. to a stake on hill in prairie; thence N. 19 E. 2,550 vrs. to the place of beginning.

And it is further ordered that a writ of restitution do issue to the marshal of said district commanding him to eject said defendants and all persons claiming by, through, or under them by right acquired since 29th day of August, A. D. 1877, being the date of the institution of this suit, and to put the plaintiff in possession of the aforesaid land recovered by him.

It is further considered, ordered, and adjudged by the court that the plaintiff do have and recover of and from said defendants
29 all costs in this behalf expended, for which let execution issue.

Motion for New Trial.

And afterwards the following motion was filed, endorsed, to wit: "No. 34. A. E. Watson *vs.* Frank H. Ayers *et al.* Defendants' motion for new trial. Filed April 30th, 1886. J. H. Finks, clerk."

Which motion is as follows:

In Circuit Court of the United States for the Northern District of Texas, at Waco.

A. E. WATSON *vs.* FRANK H. AYERS *et al.* } No. 34.

Now comes the defendant- in the above-entitled cause and moves the court to grant a new trial, because—

1st. The court erred in permitting the plaintiff to read in evidence over the objections of the defendant- the deposition of F. W. Johnson, taken in 1860, in a case then pending in the district court of Bell county, Texas, in which David Ayers was plaintiff and —— Lancaster was defendant.

30 2nd. The court erred in admitting to be read in evidence by the plaintiff the photograph copy of field-notes purporting to be made for Samuel Sawyer over the objections of the defendant-.

3rd. The court erred in its general charge to the jury, and expressly in the 4th paragraph thereof, in prescribing a rule by which they might determine the location of the northwest or back line, and in directing that the rule should be applied only in case the proof should satisfy the jury that both the western and north line were not actually run and measured by the original surveyor, and which was calculated to mislead the jury.

4th. The court erred in refusing to give the charge No. 1 (one), asked for by the defendant-.

5th. The court erred in refusing to give the charge No. 2 (two), asked for by the defendant-.

6th. The court erred in refusing to give the charge No. 5 (five), asked for by the defendant-.

7th. The court erred in giving to the jury the charge asked for by the plaintiff.

31 8th. The verdict of the jury is contrary to the evidence.

JONES & KENDALL AND
C. L. CLEVELAND,
Att'ys for Def't.

Order Overruling Motion for a New Trial.

Motion submitted and judgment entered as follows:

A. E. WATSON
vs.
F. H. AYERS *et al.* } No. 34.

MAY 1ST, 1886.

On this day came on to be heard the defendants' motion for new trial, and the court, having heard said motion and argument of counsel, is of opinion that the motion is not well taken. It is therefore ordered that said motion be, and the same is hereby, refused.

Writ of Possession.

And afterwards, to wit, on the 2d day of May, A. D. 1881, writ of possession issued, endorsed as follows:

32 No. 34. A. E. Watson *vs.* Frank Ayers *et al.* Writ of possession issued May 2d, 1881. J. H. Finks, clerk. Writ of possession returned and filed May 13th, 1881. J. H. Finks, clerk.

Which said writ is in words as follows, to wit:

United States Circuit Court, Fifth Circuit and Northern District of Texas, at Waco.

The President of the United States of America to the marshal of the northern district of Texas, Greeting:

Whereas on the 9th day of April, A. D. 1881, A. E. Watson recovered a judgment in the United States circuit court in and for the northern district of Texas, at Waco, against Frank Ayers and John R. Hall for the possession of a certain tract of land lying on Cottonwood creek, in Bell county, in the northern district of Texas, bounded and described as follows, to wit:

Beginning at a stake from which a hackberry marked B. T. D. bears N. 36° E. 143 vrs., thence S. 71 E.; at 107 vrs. passes corner of the Kavanaugh survey, 3,767 vrs. a stake in west line of J. O. Rice survey, from which double elm bears N. 26 W. 24 vrs.,

33 another elm bears —; thence S. 19 W. with the line of J. O. Rice survey 2,550 varas to a stake, from which a triple elm b'rs S. 19 E. 36 varas; thence N. 71 W. 3,767 varas to a stake on a hill on prairie; thence N. 19 E. 2,550 vrs. to the place of begin-

ning, and all costs of suit as of record is manifest: Therefore you are hereby commanded to eject said defendants and all persons claiming by, through, or under them by right acquired since the 29th day of August, A. D. 1877, being the date of the institution of this suit; and you are further commanded that you deliver to the said A. E. Watson the possession of said premises hereinbefore described, together with the sum of —— dollars, costs of suit. These are therefore to command you that of the goods and chattels, lands and tenements, and estates of the said Frank Ayers and John R. Hall you cause to be made the costs aforesaid, together with the legal fees and commissions for collecting the same, and also the costs of executing this writ, and have you said money, together with this writ, before our circuit court on or before the first day of next
34 term thereof, to be begun and held at Waco on the first Monday, being the 3d day, of October next.

Herein fail not, but due return make, as the law directs, of this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the circuit court thereof, at Waco, this the 2d day of May, in the year of our Lord eighteen hundred and eighty-one, and of American Independence the 105th year.

J. H. FINKS,
[SEAL.] *Clerk of said Court.*

The U. S. marshal's return upon the writ of possession is in words and figures as follows:

Marshal's Return.

Came to hand on May 3d, 1881, and executed on May 7th, 1881, by delivering unto A. E. Watson, pl'ff herein, the possession of the premises described in this writ by going with s'd A. E. Watson to John Anderson, the only occupant of the land, and demanding from him the possession thereof, which was amicably surrendered by him to s'd A. E. Watson.
35

A. B. NORTON,
U. S. Marshal, N. D. of T.,
By J. C. CHAPMAN, *Deputy.*

Fee	$3 00
Travel	5 40
	$8 40

Bill of Exceptions of Defendants.

In Hon. U. S. Circuit Court for Northern District of Texas, at Waco.

A. E. WATSON
vs.
F. H. AYERS *et al.* } No. 34.

Be it remembered that on the trial of this case the following evidence was offered to the jury, viz:

Plaintiff read in evidence the patent from the State of Texas, dated 16th Sept., 1850, to the land claimed by him, having the metes and boundaries as set forth in his petition.

The defendant- read in evidence the original grant to Maximo Moreno, dated 18th Oct., 1833, containing the metes and boundaries as set forth in defendants' first amended original answer, filed April 29th, 1879.

It was admitted that the plaintiff and defendants, respect-
36 ively, held and deraigned title from and under the patent and grant above referred to, according to agreement in writing in this cause filed.

It was admitted by both parties that the upper and lower corners on the river of the Maximo Moreno 11-league grant are extant as called for in the original grant to Maximo Moreno, and their corners are not in dispute.

The defendant- read in evidence the depositions of F. W. Johnson, taken in 1878 and 1880, in which he testified that he was principal surveyor for Austin's colony in 1883, and that year began at a place where what is known as the reserve crosses San Andres or Little river, and, for the purpose of getting a base line upon which to make corner, he measured upward to the junction of the Salado, Lampasas, and Leon rivers, called the three forks, in what is now Bell county, Texas. He meandered the river upwards on both sides to that point. On the east side of the San Andres river, opposite where the Lampasas river enters the San Andres river, he began to make a series of surveys on the north side of the San Andres
37 river. The first survey made was the Maximo Moreno 11-league survey. This survey was commenced at the point opposite the mouth of the Lampasas river, as called for in the field-notes of the grant, and a line was run thence on the course called for in the grant the distance called for, the chain being used to measure the distance. The northwest or second corner called for in the grant was thus established by him, the distance giving out in the prairie. In running the west line I made an offset to avoid crossing the Leon river, which was about 50 or 60 vrs. wide. This offset was made soon after leaving the beginning corner, there being a peculiar bend in the river at that point. From the northwest corner thus established the second line was run the course & distance called for in the grant. Several streams were crossed on this line at

distances not now recollected, and the northeast corner established on two small hackberries in Cow Creek bottom. From the northeast
or third corner so established a line was run in the course
38 called for in the grant to San Andres river. This last line
was marked but not measured, because it was not usual or necessary to measure the closing line.

It was admitted by defendant- that the distance as measured on the ground from the northeast corner to a creek called for in the grant was some four thousand varas more than the distance called for—that is, the distance is 7,500 instead of 3,500 vrs.; and on cross-examination, being asked to account for the discrepancy, said the distances called on that line were not measured, but guessed at. No part of the east line was measured. The exterior lines were marked with blazes. The corner trees & bearing trees, where there were such, were marked with blazes, with two hacks above and two below. In answer to question, on cross-examination, he said that he did not begin the survey at the southeast corner, but he began at the southwest corner, at the three forks at the mouth of the Lampasas, and actually traced the lines in the order set forth in the field-notes. The field book containing the same, which I kept, I
examined, which I don't remember to examine until a month
39 ago, & as hereinbefore stated.

The plaintiff, in rebuttal to Johnson's testimony, as above set forth, it appearing that said Johnson died in 1884, offered to read in evidence a deposition of said Johnson, taken in 1860, in a certain suit then pending in Bell county, Texas, wherein David Ayers was plaintiff and Lancaster was defendant, in which he stated in answer to question therein propounded that he began the Moreno survey at the southeast corner & ran thence northerly. The north line was then run westwardly, and the third, if run at all, was run southwardly to the river. I am of the opinion that no western line was run, but was left open; but the eastern and northern lines were run and measured. It was not usual to measure the closing line. To the reading of which last-mentioned deposition, proven to be in the handwriting of Johnson, taken in 1860, the defendant- objected upon the ground that the deposition had been taken in another & different cause, between other parties, before the institution of this
suit; and the same witness having testified in answer to inter-
40 rogatories & cross-interrogatories propounded herein in 1877 & 1880, respectively, it was not competent as original evidence nor admissible to contradict or impeach the testimony of the witness Johnson, as given in his deposition read by the defendant-, notwithstanding the death of Johnson, which objection the court overruled & admitted the testimony so objected to; to which ruling of the court the defendant- then & there excepted and still excepts, and the same is allowed as exception No. 1.

WILLIAM DUTY testified, by deposition taken in 1880 by defendant-, that he was with F. W. Johnson in 1833 when the Maximo Moreno grant was surveyed, and was one of the chain-carriers; that the survey was begun at a point opposite the mouth of the Lampasas,

on the north side of the St. Andres. We struck a bend on the river soon after leaving the beginning corner, and an offset was taken to avoid the bend until we got clear of the stream, & then ran back to the original line so left, and this line was continued on the course called for to the second or northwest corner; from this corner a line was run to the third or northeast corner. Both the first &
41 second lines were measured on the ground. The third line we ran on the course called for to the fourth or lower river corner, but I don't think this last line was measured. The line trees we marked with blazes. Col. Johnson invariably marked lines with blazes. I know positively that we began the Morino survey at the mouth of the Lampasas river & ran the lines as stated in the field-notes. I have a very distinct recollection of this survey, and the same witness testified by deposition taken in 1885, saying that he went upon the ground with Mr. Turner, the county surveyor of Bell county, and Mr. Moore, for the purpose of making an examination of the boundaries of the Morino survey. There was an old blazed line pointed out to me as the north line of Morino survey at or near where the defendant- claims it to be. I traced the said line, following the survey. The line was marked with three hacks. A place was pointed out to me in the bottom by Mr. Turner & Mr. Moore, on the east line of said survey, where it is said the double hackberry, or two hackberry-, stood, known as the Bigham corner, & claimed by plaintiff as northeast corner of the survey. I
42 noticed the character of the country surrounding the Bigham corner, and it does not correspond with the country of the northeast corner of said survey. I would say that the corner & surroundings pointed out to me by Turner as the Bigham corner or the double hackberry does not correspond with the country around the original northeast corner of the Morino survey, which, to the very best of my recollection, was glady, with brush predominating.

The witness further testified, by deposition taken by plaintiff in 1886, that he again went upon the ground and examined the north lines as claimed by plaintiff and defendants, respectively, & neither corresponded in appearance to the country with the line originally run by us in making the survey. About two hundred varas below the north line, as claimed by plaintiff, near Elm creek, the appearance of the country looked familiar and like that through which we originally run the survey.

W. T. RUCKER, by deposition, testified that he surveyed the Morino 11-league grant in 1871, under the orders of the district court
43 of Bell county. He began at the beginning corner, as called for in the grant, and ran the courses and distances called for in the grant, but they did not lead to the lower river corner as acknowledged by both parties. The east line, giving the courses and distances, would not be reached by about 570 varas, even if the line from the lower river corner was extended to the point of intersection with the north line as he traced it. If the lines are run according to the patent calls for courses and distances, beginning at the point opposite the mouth of the Lampasas, then the east line would

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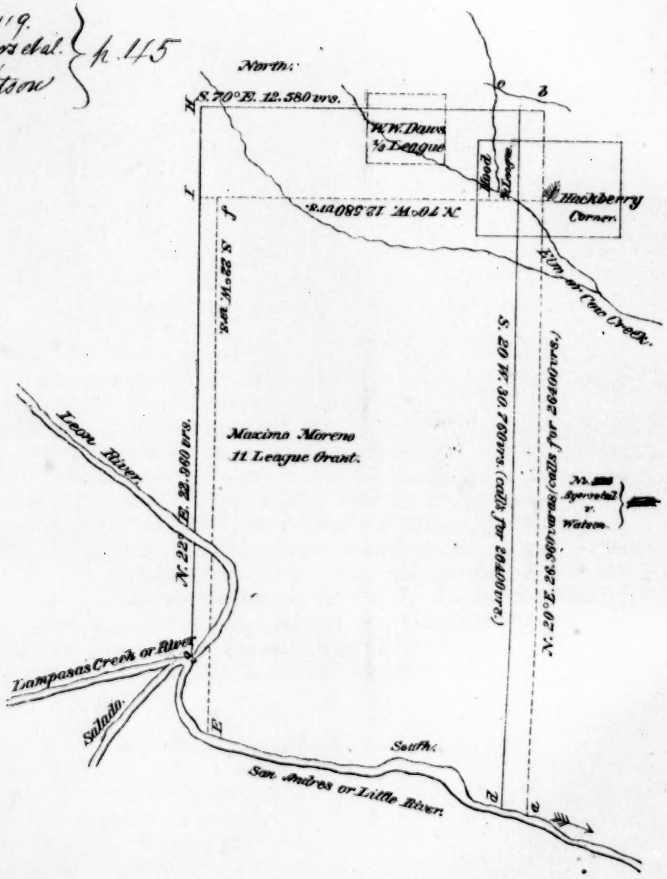

be about 4,000 varas longer than the distance called for in the grant. Upon actual measurements he found the distance called for in the field-notes as the distance from Elm or Cow creek to the river to be correct. He found the call for distance or length of the east line was less than the distance between the place where the two hackberries once stood and the river by 560 varas—that is, if a line was run on the course reversed from the lower river corner to the place
where the hackberries stood it would exceed the length of the
44 line as called for in the grant by 560 varas. The river above
the three forks is known as the Leon ; below the forks as Little river or St. Andres river. Where the course would cross the Leon, from the beginning corner opposite themouth of the Lampasas, it is about 60 varas wide. Witness stated that he did not find any of the calls in the grant for streams along the back line to correspond with the distances he found. He ran a line from the two hackberries, reversing the course, to the intersection of the west line as run from the beginning corner, crossing four streams, Big Elm or Cow creek, Cottonwood, Little Elm, and Williamson's Branch, but not at the distances, the difference being 500 varas as to one and 70 varas as to the other, the field-notes of grant calling only for two, and found no mark on this line. On all lines run by him he found hackberries of various sizes & ages. The distance called for as the back or north line, to wit, 12,580 varas from the N. W. corner, as found by following the calls of the grant, would not reach the east line, as found run from the lower river corner, by about 560 varas. If the west line is run north
22 E. 22,960 varas, the distance called for in the grant, and
44½ the north line is run from that point S. 70 E. 12,580 varas,
the north line, so located & connected with the eastern line, will include the most part of land claimed by plaintiff, the W. W. Daws survey ⅓ of a league; but if the north line is run from the so-called Bigham corner, where the two small hackberries is said to have stood, N. 70 W. to connect with the western line, the Morino survey would not include any part of the W. W. Daws survey.

The witness, in answer to the 14th interrogatory, furnishes the following sketch and explanation :

(Here follows diagram marked p. 45.)

46 The above plat represents the M. Moreno 11-lea. grant & the W. W. Daws ⅓-lea. sur. as described in my depositions, the black lines showing the Moreno grant as run from the beginning corner by courses & distances, protracting the distance on the third line in order to reach the river ; the violet-colored lines representing the survey of said grant as made by running from the lower river corner, following the marked line on the east to the point where the two small hackberries are said to have stood ; from thence reversing the course & distance of the north line to a point in the prairie, & from thence reversing course of the west line, &c. The short dotted lines show how the two surveys might be connected.

The foregoing sketch & explanation being given as an answer to direct int'y 14th.

W. T. RUCKER.

SAM. BIGHAM, witness for plaintiff, testified as follows:

Am a practical surveyor. In 1853 or '4, under an order of the district court of Bell county, surveyed the Maximo Moreno grant. He began at the three forks or mouth of Lampasas river, at the S. W. corner, where he found & identified the pecan & bearing trees
47 mentioned in the field-notes; from thence he ran the course & distance called for in the grant for the N. W. corner, and there set up a pile of rocks in the prairie. In running this line he found an old blaze thereon at about 90 varas from the beginning, which he recognized to be old enough to be made in 1833, just before entering the bottom of the river Leon—crossing that stream twice; at second crossing, at a distance of about 4,000 varas and ½ mile beyond, he entered the prairie, the line after that passing mainly through prairie & crossing Friar's branch. From the N. W. or rock pile ran course called for S. 70 E. 12,580 varas; then ran from that point the course called for in the grant to the St. Andres river and failed to find any other marked trees on the lines or the corner trees called for in the grant. Afterwards, in fall of that year, he made another search for the eastern boundary line by running across the front of the survey. About distance for 11-leagues front he found an old line marked with blazes, which led him to the lower or southeastern corner of the grant, where he found the trees & identified them as called in the field-notes of the grant. From this point, following the river N. 20 E.,
48 he found it plainly marked with old blazes 26,400 varas. Crossing Big Elm or Cow creek and Little Elm creek and following the line further on, found it marked when there was timber at about 560 vs.; on same course found two small hackberries in Big Elm bottom. This line, if extended, would pass between them. These trees were marked on the inside with old blazes, the blazes facing each other, and on the blazes there were hacks, which I took to be the N. E. corner of the survey. I went a short distance above on the course of this line; did not measure but a few hundred vrs., but found no marks. I ran a line from these two hackberries N. 70 W., the distance called for for the north line, and fell short of reaching the western line as previously run by me by about 600 vrs. On this north line so run I found no marks or indications of a marked line. The W. W. Daws survey is north of this line. If the north line of the Moreno survey was run from the point where the northwest corner would be fixed by running the course and distance from the beginning or upper river corner it would in-
49 clude the greater portion of the Daws survey in the Moreno grant, and the latter grant so run would include about fourteen leagues of land.

R. P. BIGHAM testified for plaintiff that he, John Marshall, and others were with his brother, Sam. Bigham, when he first attempted

to find the lines and boundaries of the Moreno grant. They ran from the beginning corner opposite to the mouth of the Lampasas river, the course and distance called for for the N. W. corner of the grant, where was placed a rock pile, and thence the north line by course and distance as called for in the grant, and thence from that point to the river on the course called for, with results as stated by Sam. Bigham in his testimony hereinbefore given. Witness was not with his brother, Sam. Bigham, when he made his second survey, in the fall following, when it was said he had found the two small hackberries. There were afterwards, in the year 1854, shown to witness by his brother, Sam. Bigham, and they were directly on the east line of the Moreno grant extended, and run on the proper course from the S. E. corner of the grant. These trees were
50 marked on the inside, opposite to each other, with old blazes, with fresh hacks on the blazes. Witness is a practical surveyor and has been surveying for thirty years. After they were pointed out to me I saw a line from the lower river corner up to these trees. The line was run partly at one time and partly at another. These trees are about 560 vrs. beyond the distance of the east line run by reverse course. At that time witness went a short distance above the hackberry tree and found no marked trees. I was not at this point again until 1880. The hackberries trees were then gone. At this time, 1880, in company with the defendant & Dave & Webb Moore, we traced the line beginning at a triple elm 560 varas below where the two small hackberries had stood; the purpose being to ascertain if the eastern line extended northward above and beyond the two hackberries mentioned. Taking the course of the line from the starting point, we ran and traced the line on its course north 20 east for perhaps one mile & a half until we got out of the timbers. It was getting dark, and we left off before reaching the north line, as claimed by the defendant-. After leaving the place where the hack-
51 berries once stood, on the course of this line, we found five or six trees with old blazes on them which at that time appeared to me to be as old as the blazes on the trees below where the hackberries once stood. I thought so then, and perhaps gave Mr. Ayers a certificate to that effect. I thought so then, and have so testified on previous trials of this case. It is difficult to tell the age of an old line with certainty by marks on trees, but I am now of the opinion, from an examination made recently at the instance of plaintiff, in company with him and his counsel and Mr. Hunnicutt, a surveyor from Falls county, and Mr. Harris, that they were not more than eighteen or twenty years old. The examination of these marks on the east line of which I have spoken was being made by the gentlemen named when I joined them. It was made by cutting out the marks on the trees and by counting the growths of ring marks on the timber.

JOHN W. TURNER, witness for plaintiff, testified: I am and for
52 several years have been county surveyor of Bell county. In 1880 I was employed by the defendant- to trace the eastern

& northern line of the Morino grant. There was with me the defendant, David & Lovett Moore, and Webb Moore when we began our work to trace a line from the point where Sam. Bigham found two small hackberries, which he, Bigham, took to be the northeast corner of the Morino survey. From this point, running the course of the east line as called for in the grant reversed, I traced a line for about 4,000 varas. Along this line we found several trees marked with blazes, the last one about the distance named from the point where we began. We found, perhaps, as many as six trees, and I thought then, and have so testified on former trials of this case, that they appeared to be as old as those which I found in tracing the line from the S. E. corner on the river to the Bigham corner, where the two hackberries were found. Witness then undertook to find the north or back line; went to the rock pile made by Bigham in 1854, as the northwest corner, and began his survey from there and ran S. 70 E. The country was prairie from the
53 rock pile for about 7,000 varas, and at that distance a hackberry tree was found about 100 varas north of the line being run. On examination the tree was found to have an old blaze on it. The witness moved his compass to this tree and continuing from thence the same course S. 70 E. to a point where the line he was then running intersected the line he had traced from the two small hackberries. At this point the country was glady prairie. He found three trees on this line, marked with old blazes, and a few varas from this point of intersection found a tree marked with an old blaze, on the east line, within a few feet of this point of intersection. Witness also found at this point a part of the body of a hackberry tree which had rotted. It appeared to me at that time that these blazes on the north and east line were of the same age. Near the point of intersection was a small branch lying north and east of the point of intersection and near it. The witness ran a line from the two hackberries N. 70 W. to the western boundary line of the Morino grant and found no old blaze line. In running this line he crossed four creeks at the distance
54 as follows: Big Elm, 1,520 vrs.; Cottonwood creek, 4,870 vrs.; Little Elm, 8,887 vrs., and Williamson Branch, 1,690 vrs. from N. W. cor. I was on the eastern line and on the most northern line run by me from the rock pile recently. I was with the plaintiff and the parties when they were cutting the trees along the line for the purpose of examining the marks. In running the line from the hackberry corner northward on a course which brought us to a point 70 varas west of the point of intersection spoken of above I found but one marked tree with a blaze on it, which stood about 20 varas east of the line we run. I saw none of the trees which I had seen in 1880. The block cut from this tree we examined, and we *we* also cut the marks on the blaze trees found on the north line, and from the examination made of the growth of the grain of the tree I do not think they were more than 18 or 20 years old. My opinion is that the marks on the trees so examined by us had not been made more than 18 or 20 years. Running east from N. W. corner on upper line, as claimed by def'd't-, creeks were crossed

55 as follows: Little Elm, 366 vrs.; Cottonwood creek, 4,324 vrs.; Big Elm, 11,714 vrs.

H. E. BRADFORD, witness for plaintiff, testified that he was district surveyor in Bell county in 1856; that at that time he run the east line of the Moreno grant from the S. E. corner on the river and found it plainly marked with old blazes up to the two hackberries found by Bigham. These trees had plain blazes on them, and witness took them to be the N. E. corner of the Moreno grant. I saw McMullen, former district surveyor, David Ayers, and -other one with me when I made the survey referred to above, and McMullen pointed out to me the hackberry trees.

JOHN MARSHALL, witness for plaintiff, testified: Was with Sam. Bigham when he first ran around the Moreno grant according to its calls—according to course and distance; was also with the surveyor when he found the two hackberries. We all took them to be the N. E. corner of the Moreno grant. They were marked just like the field-notes called for, and we are all satisfied that it was the northeast corner. We run a line N. 70 W. from the two
56 hackberries, the distance called for, and found no marks or signs of a line having been run there; was with Sam. Bigham when he run around the Moreno grant from the beginning corner, and found no evidence of a marked line, except one tree about 90 vrs. from the beginning corner on the Leon river.

Plaintiff read in evidence a photographic copy taken from Book C, which is deposited in the general land office of the State of Texas and recognized there as the field book of F. W. Johnson, as follows:

By agreement of counsel filed Aug. 19th, 1886, a MSS. copy of said field-notes is inserted in transcript instead of above, said copy being as follows, to wit:

166.

Monday, Feb'y 25th, 1833.

* * * *
N. 38 W. 230 (190 Buffalo creek.)
N. 69 W. 120.
North 100.
N. 48 W. 620.
North 430.
N. 63 W. 280.
N. 27 W. 500.
57 N. 80 W. 280.
S. 78 W. 400.
N. 55 W. 190.
N. 34 E. 440.
N. 40 W. 170.

167.

Monday, 25th Febr'y, 1833.

West 230 vs., creek opposite.
S. 68 W. 270.
N. 48 W. 440.
Thursday, 26th.—Snow and hail at night.
Wednesday, 27.—Clear and cold.
Thursday, 28th.—Cold.
S. 57 W. 250 varas.
N. 68 W. 220.
N. 44 W. 340.
North 470.
N. 24 W. 250.
N. 33 E. 240.

N. 72 E. 660.
N. 50 W. 100.
N. 57 W. 250.
West 220.
N. 43 W. 160.
N. 12 E. 160.
N. 32 W. 80.
S. 80 W. 400.
N. 70 W 100.

168.

Thursday, 28 *Feb'y*, 1833.

N. 83 W. 280 varas.
N. 29 W. 390.
N. 70 W. 400.
Friday, 1st March, 1883.—Rich'd Andrews & Rob't Mathews left.
Saturday, 2nd.—Jas. Price discharged; wages, $14. George Drent started to Tenaxtislan for hands.
Thursday, 14th.—Drent returned with Wm. Bear and Thos. Morrow.

169.

Thursday, 11 *April*, 1833.

N. 30 E. 170 varas.
N. 25 W. 430.
North 700.
N. 34 E. 290.
N. 14 W. 230.
N. 80 W. 240.
N. 28 W. 360.
East 430.
N. 40 E. 300.
N. 5 E. 260.
N. 51 E. 80.
S. 30 E. 260.
N. 36 E. 730.
North 230.
S. 79 W. 300.

170.

Friday, 12*th April*, 1833.

N. 81 W. 530 varas.
N. 53 E. 310.
N. 32 W. 480.
N. 26 E. 240.
N. 29 W. 480.
N. 54 W. 150.
S. 73 W. 130.
N. 24 W. 150.
N. 43 E. 580.
N. 47 W. 780.
N. 41 E. 330.
East 230.
S. 58 E. 130.
N. 60 E. 600.
N. 27 E. 190.
North 360.
N. 70 W. 140.
N. 11 W. 280.
N. 62 W. 500, Prairie R.
S. 73 W. 380, creek opposite.
N. 56 W. 630.

171.

Saturday, 13*th April*, 1833.

North 200 varas.
N. 12 W. 170.
N. 45 W. 420, creek opposite.
N. 80 W. 330.
South 370.
N. 71 W. 430.
N. 16 E. 410.
N. 37 W. 1,050.
N. 72 W. 340.
S. 52 W. 260.
S. 21 W. 700.
S. 51 W. 130.
N. 74 W. 520.
S. 11 W. 260, Horse creek.

58 *Thursday*, 18*th*.

S. 53 W. 340.
N. 86 W. 340.
S. 61 W. 350.
S. 72 W. 350.
S. 51 W. 570.
S. 35 W. 220.

West 110, bluff.
N. 55 W. 350.
N. 35 W. 2,100.
N. 12 W. 310.
N. 22½ W. 680.
N. 8 W. 250.
N. 20 W. 580.
N. 58 W. 900. } Bluff.
N. 30 W. 120. }
N. 11 W. 410 at 200——

172.

Thursday, 18*th Ap'l*, 1833.

S. 10 W. 370 varas.

—creek, mouth of 2d fork of San Andres, called Lampasas.

SUNDAY, 21*st*.

Surveyed for Samuel Sawyer 11 leagues of land, beginning on the N. side of San Andres, opposite the mouth of Lampasas.

173.

SUNDAY, 21*st Ap'l*, 1833.

At a pecan 18 in. diam. bearing N. 59 W. 14 3 vs. from a hackberry 24 in. and S. 34 W. 15 3 vs. from an elm 12 in.; thence N. 22 E. 22,960 vs. to the corner, a stake in the prairie; thence
59 S. 70 E. 1,690 vs. to a branch of Cow creek, 4,500 vs. to 2nd branch, 8,000 vs. to 3d branch, 11,060 vs. to Cow creek, 12,580 vs. to the corner, two small hackberry-s; thence S. 20 W. 3,520 vs. to Cow creek, 7,500 to N. W. corner of 2d tract, a stake, bearing N. 77 E. 93 3 vs. from a hackberry 8 in. to spring branch, 23,640 vs., 23,700 to bottom prairie; 24,360, crossed some branch to the corner, a box——

174.

THURSDAY, 21*st Ap'l*, 1833.

box elder 26,400 vs., bearing S. 48 W. 7 2 vs. from a forked cottonwood 48 in. and S. 11 E. 16 4 vs. from an elm 15 in.

STATE OF TEXAS,
GENERAL LAND OFFICE, AUSTIN, *July 6th*, 1885.

I, D. N. Robinson, chief clerk and acting commissioner of the general land office of the State of Texas, do hereby certify that the foregoing is a correct and true copy of the last twelve lines of page 166, pages 167, 168, 169, 170, 171, 172, and first six lines of page 174, of Book C, of Original English Field-Notes, also known as F. W. Johnson's Field Books, forming part of the archives of this office.

In testimony whereof I have hereunto set my hand and
60 caused the seal of the general land office to be affixed on the day and date last above written.

[SEAL.] D. N. ROBINSON,
Ch'f Cle-k & Acct'g Comm'r.

61 HUNNICUT, witness for plaintiff, testified:

Am the county surveyor of Falls county; recently, in company with plaintiff and his attorney, L. W. Goodrich, Esqr., Harris, Turner, and Bigham, made an examination on the eastern and extreme northern line of the Moreno survey, as claimed by the defendant-, and blocked out the marked trees, as stated by witness Turner, for the purpose of determining the age of the marks, and we found none that I considered to be older than eighteen years, taken from above the hackberry corner; nor do I think they were as old as those we blocked out below the hackberry corner, which I thought were old enough to have been made in 1833. I determined the age by counting the growth, which I think is a proper test.

A. J. Harris, a witness for plaintiff, testified substantially as the witness Hunnicut.

62 F. H. Ayers, the defendant; L. Moore, Web. Moore, and David Moore, for defendant, testified in substance that they were with the surveyor, Turner, and R. P. Bigham, witnesses for plaintiff, at the time—in 1880 or 1881—when they were running and making their examinations on the eastern line. They followed that line from the lower river corner on its course N. 70 E. to the point of intersection with the north line, at a distance of about 4,000 vrs. beyond the place where Bigham is said to have found the two small hackberries, up to the place where Bigham is said to have found the two hackberries. The line was mostly through timber, and was plainly marked with old blazes from the hackberries northward on the course of the east line continued. They found as many as six or seven trees with old blazes on them, apparently as old as any below the hackberries and presenting no difference in appearance or age as compared with those below. The last tree found on this line was an elm tree within a few varas of the point of intersection with the extreme north line as run by Turner. After passing the Bigham corner, where it was claimed the hackberries
63 had stood, the timber became scarcer, and about 1,000 vrs. the country became more prairie-like and glady about the point of intersection, and along the line extended there was many stumps of trees that had been cut. In running this east line at about 600 or 700 vrs. we found the stump of a large oak tree directly on the line.

Mr. LEMLEY, witness for defendant-, testified that in 1867, from what he had been told with respect to the position of the east line of the Maximo Moreno grant, he went to a large oak tree then standing about 600 or 700 vrs. above the place known as the Bigham corner; this tree was plainly marked with an old blaze—how old

witness could not say, but it had the appearance of being very old. Witness went with Mr. Hanna, a surveyor, a short while ago, after the marks on the line had been blocked out, and in coursing the E. line with him he placed his compass at the stump of the blazed tree I had seen standing in 1867, and running on the course of the east line we traced down the same to the place where the two hackberries were said to have stood, and four or five hundred vrs.
64 below along the line which had been blocked out on the course of the east line of the grant. Witness is now, and since the year 1867 has been, living in that neighborhood, about a mile and a half from the oak tree described above.

WILLIAMS STEPHENS, a witness for defendant, testified:

In December, 1859, as one of the heirs of I. L. Hood and as a representative of the Hood estate, I went on the eastern line of the Moreno grant for the purpose of effecting a compromise of a suit then pending in the district court of Bell county between David Ayers, the father of defendant, and the heirs of Hood, involving the location of the eastern line of the Moreno grant. S. W. Bigham and R. P. Bigham were along as surveyors. We first began on what was recognized as the east line of the Moreno grant, below the place where S. W. Bigham had claimed to have found the two small hackberries; from said point below we traced said east line on the course thereof N. 20 E. to the place which Bigham pointed out to us where he had found the hackberries; these hackberries were not standing then; from that point we continued to trace the line on the same course and went about 1,000 vrs. to a point where
65 we reached the open country; this line above the hackberry point was marked as far as we went with blazes, they having the appearance of being old, and this line was adopted as the eastern line of the Moreno grant in making the compromise. The blazed trees we found above the hackberries, or the place where they stood, had the same appearance as to age as those below. I don't remember how many blazed trees we found, but they were found on the line as far as we went. Witness was then seventeen years old and had studied surveying and understood it.

HANNA, witness for defendant-, testified:

Is a practical surveyor and followed the business for many years in Kentucky and about two years in Bell county, Texas; had been several times on the east line of the Moreno grant surveying, and had traced it several times from a point 500 or 600 vrs. below where the hackberry trees are said to have stood to its northern extremity, as claimed by defendants. These tracings were made at different times and all since the marked trees were blocked. A short while after the blocking I went on the ground for the purpose of examination. Mr. Lemly, the defendant, and the Moores
66 were with me. Mr. Lemly took me to the ash stump referred to by him in his evidence. I then set my compass and ran the course S. 70 E. to a point about 500 or 600 vrs. below the place

where the two hackberries are said to have stood, passing trees from which blocks had been cut. We then retraced the same line N. 20 E., passing the ash stump referred to, and further on, on the same course, we came to an elm tree, which had been blocked, within a few feet of the line. Lying by the tree was a part of the block and about thirty varas off we found another piece of a block, and fitting them together we fitted them in the tree and found they had been cut out of this tree, as they exactly fitted the place. This was the only block cut out of the trees that I found during my tracing of the line. The block now exhibited in court is the one I found. I have examined this block with the naked eye and with a magnifying glass to determine, if I could from the growth since it was blazed, the age of the blaze, and I concluded that the mark was either thirty-seven or fifty-three years old, depending upon whether the appearance
67 of one portion was the growth of one year of large and rapid growth, as might occur in a wet year, or the growth of a series of dry years, which climatic influences greatly affect. I do not consider the counting of the rings or growths a reliable test by which to determine the age of a mark on a tree. It is liable to be varied by so many causes—soil, climate, dry and wet seasons, the kind of tree, etc. I know of one tree marked as a corner tree, which is conceded to have been marked in 1834, and it is to-day by measurement only one-tenth of an inch larger in diameter than it was when it was marked, according to the measurement or diameter given in the original grant. I refer to the same tree referred to by the witness Turner as found at the corner of the Duggan survey.

DAVID MOORE and LUBBOCK MOORE, witnesses for defendant-, also testified that they were with the surveyor, Turner, when, in 1880, he ran the north line of the Moreno survey, beginning at the point where the distance from the beginning corner gave out, and these two witnesses testified the same in substance as the witness Turner concerning the finding of blazed trees and their
68 appearance, as to age and position, with regard to the line, and the finding of the dead hackberry tree at the point of intersection with the east line, and the finding of the blazed elm tree near this point of intersection.

It was proven that the defendant at the time of the filing of this suit was, by tenant, in possession of the W. W. Daws survey, and that the value of said tract in controversy in this suit was and is ten thousand dollars.

The witness Hunnicutt, the surveyor, examined the block produced by the witness Hanna, and testified that, in his opinion, the mark on the block was not a surveyor's mark or made by an edged tool.

On this evidence the court gave the jury the general charge, as follows:

A. E. WATSON
vs.
FRANK AYERS. } Charge Given the Jury April 29, 1886.

In this case the defendant admits that plaintiff is entitled
69 to recover unless the Maximo Moreno grant, which defendant owns, and which is an older survey than the Daws survey, owned by the plaintiff, extends so as to include all or any part of the Daws survey.

The only issue between the parties is one of boundaries, and the burden of proof is on the defendant to show to your satisfaction that the boundary lines of the Maximo Moreno grant do in fact include a portion of the Daws survey. These boundaries being thus disputed, the defendant claiming that they do embrace a portion, at least, of the Daws survey, and the plaintiff contending that said boundaries do not include any portion of that survey, it becomes your duty to fix said boundaries from the proof given you in this case. In considering the proof the rule of law (and of common sense) requires you to follow the tracks of the surveyor on the ground so far as the proof enables you to follow them on the ground with reasonable certainty, and where the surveyor cannot be tracked on the ground you will follow the course and distance he gives in the field-notes in the grant so far as these do not conflict with the tracks that you do find that he made and marked on the ground; and you will constantly bear in mind in considering the proof in this case that in fixing the boundaries of a grant the
70 rule requires that course shall control distance as given in the calls of the field-notes of the survey, and that marked trees designating a corner or a line on the ground shall control both course and distance. The fact that the lines of the Maximo Moreno grant include more than eleven leagues of land is wholly immaterial, except as a circumstance to aid you in construing or weighing the other proof in the case.

In order to reconcile or elucidate the calls of a survey in seeking to trace and fix the lines upon the ground you are not required to begin at the corner called for in the grant as the "beginning" corner. The corner so named as the beginning corner does not control more than any other corner actually well ascertained and established, nor are you constrained to follow the calls of the grant in the order that said calls stand recorded in the field-notes, but you may reverse the calls and trace the lines the other way, and should do so if from your view of the proof to so reverse the calls will aid you to so fix the boundaries of the Maximo Moreno grant as will most nearly harmonize all the calls in the grant with the
71 corners and lines that are established and with the object of the grant.

In reference to the boundaries of the Maximo Morino grant these points are clearly established and accepted by the parties, namely, the exact location of both of the corners on the San Andres or little river, and the actual location on the ground of the eastern line from

the S. E. corner on the course called for in the grant, and to a distance several hundred varas further than the distance called for in the grant for this line. The actual location of the other or S. W. corner and the course of the west line also fixes the distance between the east and west lines at any given point, to be measured on the course of the back or north line without regard to the distance called for in the grant as the length of said back or north line. You will perceive that if the proof enables you to fix the true distance for the length of either the west or east line of the survey—that is, to find either of the disputed corners on the ground—that corner will fix the true boundaries of the grant. The original field-notes do not call for any landmarks at the intersection of the west
72 line with the back or north line—that is, at the N. W. corner. At the intersection of the back line with the east line (the line found now to have been plainly marked on the ground by the original surveyor for more than 26,400 varas, the distance called for in the field-notes for said line) two small hackberries are called for to serve for a landmark for the corner on this line. There has been proof given you tending to show the point on this line where the two small hackberries called for as a landmark for this N. E. corner actually stood, and if the proof satisfies you as to the point on said east line where said hackberries stood you will fix the boundaries of the grant by a line run from that point N. 70 W. to the west line of said grant, and if said line run N. 70 W. falls south of the Daws survey (leaving said Daws survey wholly north of said line) you will find a verdict for the plaintiff in this case; but if said line N. 70 west cuts the Daws survey you will find for the defendant.

If, however, in your judgment, the proof in this case is not sufficient to enable you to fix the point where said two hackberries
73 called for in the field-notes of the original surveyor stood, and the proof does not satisfy you that the west and north lines were actually run and measured by the original surveyor, you may fix the north line of this grant in either of these two ways, adopting that one of these two ways which, in your judgment, from the proof will so fix said north line as will most nearly harmonize all the calls of the grant with the corners and lines that are established, namely: You may begin at the S. W. corner on the river and find the northwest corner by the course and distance of the first line, and extend the second line for the north or back line so as to intersect the east line (a line run N. 20 E. from the S. E. corner on the river, or you may begin at the S. E. corner on the river and follow thence the east line N. 20 E. the distance called for in the field-notes for said line 26,400 varas) and as much farther as the proof satisfies you that said line was actually marked on the ground by the original surveyor and at the point beyond which the proof fails to show to your satisfaction that this line was marked by Johnson. You may
74 fix the N. E. corner and thence extend the line N. 70 W. to the west line of said grant as the north or back line of said grant, and if the north or back line as fixed by you does not cut the Daws survey you will find for the plaintiff; if it does cut said survey you will find for the defendant.

That I may be sure of being understood in my designation of corners, I state that by the S. W. corner I mean the corner opposite the mouth of the Lampasas river and the beginning (or termination) on the river of the west line of the grant.

McCORMICK, *Judge.*

Filed May 1st, 1886.

J. H. FINKS, *Clerk.*

The court, at the request of defendant-, gave, in addition to the general charge, the following two charges:

In U. S. Circuit Court for the Northern District of Texas.

WATSON
vs.
AYERS *et al.*

In the above-entitled case the defendant- asks the court to charge the jury as follows:

If the proof satisfies you that there are old blazes along
75 the east line above the hackberries said to have been found by Bigham in 1854, and that such blazes extend to a distance of about 4,000 varas to the point of intersection with the course of the north or back line as run from the northwest corner as established by its calls, and that such back or north line is also marked with old blazes, and that these lines were so run and marked by the original surveyor in 1833, then in that case you will find for the defendant.

JONES, KENDALL & CLEVELAND,
Att'ys for Def'ts.

Given.

A. P. McCORMICK, *Judge.*

Filed April 29, 1886.

J. H. FINKS, *Clerk.*

In U. S. Circuit Court for Northern Dist. of Texas.

WATSON
vs.
AYERS *et al.*

The defendant- asks the court to charge the jury as follows:

It would not be proper to reverse the calls of the grant made to Moreno and to run in reverse course from the southeast cor-
76 ner for the purpose of ascertaining where the northeast corner would be found by the measurement called for in the grant, if in fact the east line was not actually measured at the time the same was originally made, if the evidence satisfies you that the west-

ern and northern lines were actually measured by the original surveyor on the ground.

JONES, KENDALL & CLEVELAND,
Att'ys for Def'd't.

Given.

A. P. McCORMICK, *Judge.*

Filed April 29, 1886.

J. H. FINKS, *Clerk.*

Bill of Exceptions No. 2.

And the defendant, by his counsel, then and there excepted to all that portion of the general charge of the court as prescribes the rules of law for the guidance of the jury in the event that the proof was not sufficient to enable them to fix the point where the two hackberries called for in the grant by the original surveyor stood, and especially on the paragraphs beginning with the words "If, however, in your judgment, the proof in this case is not sufficient
77 to enable you to fix the point where the two hackberries called for in the field-notes of the original survey stood, and the proof does not satisfy you that the west and north lines were actually measured by the original surveyor, you may fix the north line of this grant in either of these two ways, adopting that one of these two ways which, in your judgment, from the proof, will so fix said north line as will most nearly harmonize all the calls of the grant with the corners and lines that are established, namely: You may begin at the southwest corner, on the river, and find the northwest corner by the course and distance of the first line, and extend the second line for the north or back line so as to intersect the east line (a line run N. 20 E. from the S. E. corner on the river), or you may begin at the S. E. corner on the river and follow thence the east line N. 20 E. the distance called for in the field-notes for said line (26,400 vrs.) and so much further as the proof satisfies you that said line was actually marked on the ground by said original surveyor, and at the point beyond which the proof fails to
78 show to your satisfaction that this line was marked by Johnson, you may fix the N. E. corner and thence extend a line N. 70° W. to the west line of said grant as the north line of said grant;" and the defendant, by his counsel, still excepts to the part above quoted of said charge, and asks that the same be allowed as part of his bill of exceptions, and it is accordingly done.

Bill of Exceptions No. 3.

The court gave, in addition to its own general charge, the following charge to the jury, by request of plaintiff's counsel, as follows:

"In seeking to retrace the lines of an old survey on the ground by following the calls in the survey, and discrepancies or inconsistent calls are found, so that the survey may be made in different ways, and it does not certainly appear from the evidence which is the true way, then, because it is the duty of the party claiming

under such grant to show and identify his boundaries by satisfactory evidence, the jury should adopt that way which is least
79 unfavorable to the other party, and in this case, if the jury are not satisfied from the evidence where on the ground the two small hackberr*ies* trees were located, and if you are not able to locate the north line of the Moreno grant by the calls for creeks contained in the field-notes, then you should locate the said line by course and distance from the marked corners on the river, both of which are undisputed; and if you find from the evidence that the call for distance from one of said corners will place the said north line at a different place than the call for distance from the other corner, and if you are unable to determine from all the evidence with reasonable certainty where the said line was in fact located, you will adopt the method of locating said line which is most favorable to the plaintiff in this case; and if, in locating the said line, you find that the Daws survey claimed by Watson is not included within the bounds of the Moreno grant claimed by defendant, you will find for the plaintiff; otherwise for the defendant."

Which charge the court gave as requested, and to the giv-
80 ing of which the defendant, by counsel, then and there excepted and still excepts, and asks that the same be allowed and enrolled as such in this bill of exceptions, which is accordingly done.

Bill of Exceptions No. 4.

The defendant, by his counsel, asked the court to give the following charge to the jury, to wit:

"If the proof does not satisfy you that the two hackberries (said to have been found by Bigham in 1854, 560 varas north, 20 east from the point where the distance gives out, measured from the lower river corner) have been identified as the same which were marked by the original surveyor for the northeast corner of the Moreno survey, then, if they believe from the evidence that the western and the northern lines were run according to the field-notes, they should find for the defendant."

Which charge the court refused to give; to which refusal the defendant then and there excepted and still excepts, and asks that the same be allowed and enrolled as such in this bill as bill of exception No. 4, which is accordingly done.

81 *Bill of Exceptions No.* 5.

And the defendant asked the court to charge the jury further as follows, to wit:

"That if the testimony is not sufficient to identify the two hackberries, said to have been found by Bigham in 1854, with those called for in the field-notes of Maximo Moreno grant as the true northeast corner, as fixed on the ground by the original surveyor in 1833, and if the jury cannot fix the northeast corner nor the back line by any other marks or monuments, then they will fix it by

the courses and distances of the first and second lines of the survey, except that the second line of the survey should be extended so as to meet the recognized east line as marked and extended beyond the hackberries."

Which charge the court refused to give; to which refusal the defendant, by his counsel, then and there excepted, and asks that the same be allowed and enrolled as such in this bill as bill of exception No. 5, which is accordingly done.

Bill of Exceptions No. 6.

And the defendant, by his counsel, asked the court to charge the jury further as follows, to wit:

82 "The defendant asks the court to charge the jury as follows:

"The jury are charged that the field-notes which entered into and formed part of the title originally made to Maximo Moreno are those which are to control them in their findings in respect to the work of the surveyor in the field; that they will not consider any field-notes of a survey purporting to have been made for Sawyer unless the evidence should show that the field-notes last mentioned entered into and were incorporated in the grant made to Moreno, and unless the proof shows that the Sawyer field-notes are those which entered into and formed part of the title to Moreno, then they will disregard them and look only to the field-notes in the title issued to Moreno."

Which charge the court refused to give to the jury; to which refusal the defendant, by his counsel, then and there excepted and still excepts, and — that the same bill [be] allowed and enrolled as such, as bill of exception No. 6, which is accordingly done.

And the defendant, by his counsel, having made the several exceptions hereinbefore set forth to the rulings of the court and still adhering thereto, asks that this his bill of exceptions

83 may be signed, which is accordingly done, that the same may become part of the record as such, this 30th day — April, 1886.

A. P. McCORMICK,
U. S. District Judge.

Bond.

Bond for writ of error endorsed, to wit: No. 34. A. E. Watson *vs.* Frank Ayers *et al.* Appeal bond for $500.00. Filed June 27, 1886. J. H. Finks, clerk.

Which is in words as follows:

Know all men by the- presents that we, Frank H. Ayers, as principal, and C. L. Cleveland and John Farley, as sureties, are held and firmly bound unto A. E. Watson, appellee, in the just and full sum of five hundred dollars, to be paid to the said A. E. Watson, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs,

executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 31st day of May, in the year of our Lord one thousand eight hundred and eighty-six.

84 Whereas lately, at a regular term of the circuit court of the United States for the northern district of Texas, at Waco, in a suit depending in said court between A. E. Watson, as plaintiff, and Frank H. Ayers *et al.*, as defendant-, a judgment was rendered in favor of the plaintiff in the said circuit — on the 29th day of April, 1886, against the said Frank H. Ayers *et al.*, the said suit being designated as No. 34 on the records of said court; and the said Frank H. Ayers having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said A. E. Watson, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Frank H. Ayers shall prosecute his writ of error to effect and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

F. H. AYERS. [SEAL.]
C. L. CLEVELAND. [SEAL.]
JOHN FARLEY. [SEAL.]

Approved by—
A. P. McCORMICK,
Dist. Judge.

85 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between A. E. Watson, as plaintiff, and F. H. Ayers *et al.*, as defendants, a manifest error hath happened, to the great damage of the said F. H. Ayers and John R. Hall, as by his [their] complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, 1886, next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

The Seal of the U. S. Circuit Court, Northern Dist. Texas, Waco.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 31st day of May, in the year of our Lord one thousand eight hundred and eighty-six.

J. H. FINKS,
Clerk of the Circuit Court of the United States,
Northern District of Texas, at Waco.

Allowed by—
A. P. McCORMICK,
Dist. Judge.

[Endorsed:] Writ of error. Filed June 27, 1886. J. H. Finks, clerk.

86 The United States of America to A. E. Watson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Texas, at Waco, wherein Frank Ayers and John R. Hall are plaintiffs in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the U. S. circuit court, at Waco, Texas, this 27th day of June, in the year of our Lord one thousand eight hundred and eighty-6.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Waco.]

J. H. FINKS,
Clerk U. S. Cir. Court.

[Endorsed:] # 34. Frank Ayers *et al.*, p't'fs in error, *vs.* A. E. Watson, def't in error. Issued June 27, 1886. J. H. Finks, clerk. Returned & filed July 3, 1886. J. H. Finks, clerk.

On the 3d day of July, in the year of our Lord one thousand eight hundred and eighty-six, personally appeared Van Hall before me, the subscriber, J. H. Finks, United States commissioner, at Waco, Texas, and makes oath that he delivered a true copy of the within citation to A. E. Watson in person, at Marlin, Falls county, Texas.

VAN HALL.

Sworn to and subscribed the 3d day of July, A. D. 1886.

J. H. FINKS,
U. S. Comm'r.

Marshal's costs, $4.60.

87 *Assignment of Errors.*

T. H. AYERS *et al.*, Plaintiffs in Error,
vs.
A. E. WATSON, Defendant in Error. } In Error.

The plaintiffs in error assign the following as the errors committed by the circuit court of the United States for the northern district of Texas, at Waco, as appears from the records and proceedings in said cause:

1st. There is error, in this, to wit, that the court permitted defendant in error, at the trial of the cause, to read in evidence a deposition of F. W. Johnson, taken in 1860, in another suit between other parties, as shown by bill of exception No. 1.

2nd. The court erred in its charge to the jury in that part of its charge directing the jury how to locate the survey in the event they were unable to find the place where the two small hackberry trees stood, as shown by bill of exception No. 2.

3rd. The court erred in giving to the jury the charge asked
88 by defendant in error in addition to the general charge of the court, as shown by bill of exception No. 3.

4th. The court erred in refusing to give to the jury the charge asked by plaintiff- in error, shown by bill of exception No. 4.

5th. The court erred in refusing to give to the jury the charge asked by plaintiff- in error, shown by bill of exception No. 5.

6. The court erred in refusing to give to the jury the charge asked by plaintiff- in error, shown by bill of exception No. 6.

Wherefore plaintiffs in error pray that the judgment of said circuit court may be reversed and the cause be remanded for a new trial.

C. L. CLEVELAND AND
JONES & KENDALL,
Att'ys for Plaintiffs in Error.

(Endorsed as follows, to wit:)

F. H. Ayers *et al.*, plaintiffs in error, *vs.* A. E. Watson, def'*td* in error. Assignment of errors. Filed June 27, 1886. J. H. Finks, clerk.

89 I, John H. Finks, clerk of the circuit court of the United States, 5th circuit, in and for the northern district of Texas, at Waco, certify that the foregoing eighty-nine pages in writing contain a full and true transcript of the record and all the proceedings had as they appear of file and record in this court in cause No. 34, entitled A. E. Watson *vs.* Frank Ayers *et al.*

In testimony whereof I have hereunto set my hand and the impress of the seal of said circuit court, at Waco, this 20th day of August, A. D. 1886.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Waco.]

J. H. FINKS, *Clerk.*

Endorsed on cover: N. Texas C. C. U. S. No. 119. F. H. Ayers and John R. Hall, plaintiffs in error, *vs.* A. E. Watson. Filed October 4, 1886.

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Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 119.

F. H. AYERS and JOHN R. HALL, Plaintiffs in Error,

vs.

A. E. WATSON.

In Error to the Circuit Court of the United States for the Northern District of Texas.

BRIEF FOR PLAINTIFFS IN ERROR.

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Supreme Court of the United States.

OCTOBER TERM, 1889.—No. 119.

FRANK AYERS AND JOHN R. HALL, PLAINTIFFS IN ERROR,

vs.

A. E. WATSON, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

1. This is an action of ejectment brought by the defendant in error to try the title to a tract of land in Texas. The plaintiff below, Watson, claimed the land in dispute under a grant to the heirs of one Daws for one-third of a league. The great question in the case was whether the Daws grant was within the limits of an older grant known as the "Morino" grant for eleven leagues. It was conceded that if the "Daws" grant was not within the limits of the "Morino" grant, Watson was entitled to recover. The result depended on the location of the lines of the "Morino" grant.

The questions of law which have arisen grow out of the charge of the court below directing the jury as to the considerations which should guide them in making up their verdict. These questions of law arise from exceptions taken to the charge of the judge, and to his refusal to make certain charges requested by defendants below.

This case has been heretofore before this court (*vide* 113 U. S., 594), and the judgment was reversed, and the case remanded for a new trial, and had the instructions which this court said should have been given to the jury, been given when it went back, we should not now be here. We shall demonstrate to the court that those same instructions would have been correct upon the evidence adduced upon the trial, but were practically refused by the court below and others in conflict with them were given.

Evidence and Observations Thereon.

We admit that the lines of the original survey of 1833, whereon our grant is based, exceeds 11 leagues; but our contention is that if the grant can be located by following the footsteps of the surveyor, then the *amount* of land in it becomes immaterial. That the W. and N. lines were run and actually measured on the ground, and the beginning corner established and proven; and that the E. and S. lines were run and marked, but *not measured.*

The upper and lower river corners of the Morino grant admitted. (Record, p. 16.)

The extent of the front on Little river (the south line) admitted. (Record, p. 22.)

There is no dispute as to the eastern line, from the lower river corner to the so-called Sam. Bigham hackberries. (Record, p. 22.)

The western line has one mark, about one hundred varas from the Little river. (Record, p. 20.)

The original survey of the Morino grant, made in 1833, commenced at the upper corner on the Little river, and running the course and distance called for in the grant to the northwest corner, and thence to the northeast corner, where two small hackberries stood for the northeast

corner, from thence to the lower corner on the Little river. This line marked, but not measured. (Record, p. 17). Offset at the beginning corner. (Record, p. 16). The field-notes stating: "Beginning the survey, * * and a line was run to the north 22 degrees east, 22,960 varas, and planted a stake in the prairie for the second corner, etc." (Record, p. 6.)

The Morino survey the first survey made in the locality (Record, p. 16), and said to be the only 11-league survey.

Blazed trees, old blazes apparently as any on the eastern line, or north line. (Record, p. 18.)

Marked line for $1\frac{3}{4}$ miles on east line above the so-called Bigham hackberries, marked with *blazes* of the *same age apparently* as below the Bigham hackberries. (Record, p. 17).

The point of intersection of north and east lines was two varas from a tree *marked* with *old blazes.* Within 7 or 8 feet of this point of intersection of *north* and *east* lines found body of hackberry tree which had fallen down. (Surveyor Turner, Record, f. 53). There was a small branch about 100 yards from the point of intersection above mentioned. (Record, f. 53.)

On the east line the distance as measured on the ground, from the northeast corner to a creek called for in the grant, was some 4,000 varas more than the distance called for. The distances on that line were not measured but guessed at. No part of the east line was measured. (Record, f. 38, p. 17.)

On the east line above the Bigham hackberries run as called for in the grant reversed was a marked line, several trees—as many as six trees—marked with blazes. (Turner's testimony, Record, f. 52, p. 22.)

Several lines were run from the Bigham hackberries on the east line to the west line (from the beginning

southwest corner to the northwest corner in the prairie), but no old line nor any marked trees were found by anybody.

Both the first and second lines were measured on the ground. (Record, f. 41, p. 18.)

The line from the southwest corner was run thence on the course called for in the grant the distance called for, the chain being used to measure the distance. (Record, f. 37, p. 16.) From northwest thus established (by measurement) the second line was run the course and distance called for in the grant. (Record, f. 37, p. 16.)

It appears, then, to state our case briefly, that the two corners on the river are admitted, and the line between them, and the western line from *g* to H is necessarily established by course and distance, sustained to a certain extent by one mark about a hundred varas from the Little river. (Record, p. 20.) The northern or back line we consider established by the finding of "old blazes along the line of the same age, apparently, of the blazes on the eastern line." (Turner's evidence, Record, p. 22.) Along this line he found three trees, marked with old blazes, and a few varas from this point of intersection found a tree marked with an old blaze at the E. line, within a *few feet* of this point of intersection. Also found a part of the body of a hackberry, which had rotted. (Record, f. 53, p. 22.) From the *intersection* of the *northern* or *back* line is a *blazed line* to the *lower river corner* a. The eastern line from the two hackberries, known as the "Bigham corner," to the lower corner being admitted.

In the face of this strong case, as we insist, in favor of the location of the lines of the Morino grant, we find the principal obstacle to be the contention of the defendant here that the eastern line terminates at the two hackberries known as the Bigham corner. This objection is,

we submit, without a particle of force. It is condemned beyond controversy.

First. The evidence is conclusive that the eastern blazed line, the mark peculiar to eleven-league grants, extends for nearly 2 miles north of this so-called Bigham corner. (Record, pp. 16, 17.)

Second. Rucker, surveyor, failed to find any marked trees on the line he ran between the so-called Bigham corner and the western line (Record, p. 20), though the so-called Bigham hackberry corner was in a thick-wooded country. (Record, p. 18.)

Third. It is condemned by the marked lines and intersection corner of the north and eastern lines found by Turner. (Record, p. 18.)

Fourth. It is condemned by the course and distance of the western and north lines.

Fifth. There are no bearing trees to witness the fact that the two Bigham hackberries are corner trees.

From the view of the evidence we have been considering, and other undisputed facts in the case, we submit that the condition of the case is as follows:

1. The two lower corners on the river are admitted, and also the line between them called the south line.

2. The eastern line is admitted as far as the so-called Samuel Bigham hackberry corner.

Beyond that point it is established up to the letter *b* on the diagram, by the uncontradicted evidence of the surveyors, Turner and R. P. Bigham.

We assume, then, that the eastern line is established from the lower river corner to the intersection with the north, or back line.

3. The north, or back line, running on the proper course, is established by the trees marked with *old blazes, apparently of the same age* as the blazes on the east line followed by the surveyor, Turner.

4. The western line, starting from the upper river corner, and run on its course and distance, would reach its intersection west of the north, or back line, as established by Turner, by extending it 155 varas north of the rock pile set up by the Bigham's surveyors, in 1854, if they were correct in the distance run by them.

5. We submit that the plaintiff below (the defendant here), in admitting the eastern line from the lower river corner to the so-called Bigham hackberry corner, necessarily admitted that a line running from the northwest corner to the eastern line, on the provided course of that line, was the north, or back line, though it should exceed the length of that line, as called for in the grant, by 560 varas, as stated by the surveyor, Rucker. (Record, p. 19.) We submit that the plaintiff below, in admitting the eastern line, necessarily admitted the essential attributes of that line; one of which is that it is not too great a distance from the western line, or that the north line may be rightfully extended to it.

Further, as to the eastern line:

The plaintiff below (defendant here) admits that the line running from the lower river corner, at "*a*," to the so-called Bigham hackberry corner, represented on the plat at page 19 of the Record, is the true eastern line. This admission is important as to the general fact that the eastern line is admitted for the greater part of its distance; that is to say, from the lower river corner, at *a*, to the so-called hackberry corner. For the reasons al-

ready stated, it is clear that the eastern line extends beyond the so-called hackberry corner to the true northeast corner, at *b*, on the said plat.

The First Assignment of Error

Relates to the first exception which is to the admission of incompetent evidence, as follows:

"The plaintiff, in rebuttal to Johnson's testimony, as above set forth, it appearing that said Johnson died in 1884, offered to read in evidence a deposition of said Johnson, taken in 1860, in a certain suit then pending in Bell County, Texas, wherein David Ayers was plaintiff and Lancaster was defendant, in which he stated in answer to question therein propounded that he began the Morino survey at the southeast corner and ran thence northerly. The north line was then run westwardly, and the third, if run at all, was run southwardly to the river. I am of the opinion that no western line was run, but was left open; but the eastern and northern lines were run and measured. It was not usual to measure the closing line. To the reading of which last-mentioned deposition, proven to be in the handwriting of Johnson, taken in 1860, the defendant objected upon the ground that the deposition had been taken in *another* and *different* cause, between *other* parties, before the institution of this suit; and the same witness having testified in answer to interrogatories and cross-interrogatories propounded herein in 1877 and 1880, respectively, it was not competent as original evidence nor admissible to contradict or impeach the testimony of the witness Johnson, as given in his deposition read by the defendant, notwithstanding the death of Johnson, *which objection the court overruled and admitted the testimony so objected;* to which ruling of the court the defendant then and there excepted, and still excepts, and the same is allowed as exception No. 1."

There is no question that when the witness Johnson was upon examination in this cause, he might have been

confronted with the deposition taken in another suit between other parties as contradicting the statements he was now making, just as he might be with any writing he had previously made or signed. But, being thus presented to him, he would have had opportunity to *explain* any conflict in his testimony. When a witness is being examined orally, if it is desired to impeach his testimony by contradicting him, it is necessary "first to ask him as to the time, place, and person involved in the supposed contradiction" and for the reason that "he may recollect and *explain what he has formerly said.*" (1 Greenleaf, 462.) If it is by a letter no question can be asked as to the contents "without having first *shown to the witness* the letter."

(*Id.* 463.)

To impeach a witness by showing that he has made a statement materially different from the facts sworn to by him, a foundation must be laid by *questioning the witness* as to such statement.

(United States *vs.* Dickinson, 2 McL., 325.)

A *deposition* can not be read to impeach the statement of a witness by proving certain conversations of the witness respecting the transaction, *unless the witness is first questioned* as to the conversation.

(Chapin *vs.* Siger., 4 McL., 378.)

The right *to explain* is the right of the witness himself and of the party against whose interest the impeaching testimony is introduced and the opportunity of exercising this right of explanation is essential to the introduction of the testimony.

In the case at bar the witness was examined twice in this case by deposition—once in 1878, and again in 1880. In 1884 he died. It appears from the record that this

case was tried April 26, 1879, again on April 19, 1880, and again on the 8th of October, 1880—all in the lifetime of the witness. Now, upon the trial of the case in 1886, the plaintiff at the hearing introduced a deposition of the witness taken in 1860, in another and different suit, between other parties and before the institution of this suit, and we submit that this testimony was incompetent as against this defendant, not only for the reason that the witness had no opportunity of explaining it, but because it was *res inter alios* acts. And we may remark, that it appears on the face of the proceedings that it was not offered in good faith to impeach the deceased witness, whose testimony is fully corroborated by the chain-bearer, William Duty, and by the calls in the grant, but rather for the purpose of getting before the jury some original conflicting testimony upon which to base prayers for charges.

The Second Assignment of Error

Relates to the second exception, which is as follows:

And the defendant, by his counsel, then and there excepted to all that portion of the general charge of the court as prescribes the rules of law for the guidance of the jury in the event that the proof was not sufficient to enable them to fix the point where the two hackberries called for in the grant by the original surveyor stood, and especially on the paragraphs beginning with the words:

"If, however, in your judgment, the proof in this case is not sufficient to enable you to fix the point where the two hackberries called for in the field-notes of the original survey stood, and the proof does not satisfy you that the west and north lines were actually measured by the original surveyor, *you may fix the north line of this grant in either of these two ways*, adopting that one of these two

ways which, in your judgment, from the proof, will so fix said north line as will most nearly harmonize all the calls of the grant with the corners and lines that are established, namely: You may begin at the S. W. corner, on the river, and find the N. W. corner by the course and distance of the first line, and extend the second line for the north or back line, so as to intersect the east line (a line run N. 20 E. from the S. E. corner on the river), or you may begin at the S. E. corner on the river and follow thence the east line N. 20 E., the distance called for in the field-notes for said line (26,400 vrs.,) and so much further as the proof satisfies you that said line was actually marked on the ground by said original surveyor, and at the point beyond which the proof fails to show, to your satisfaction, that this line was marked by Johnson, you may fix the N. E. corner and thence extend a line N. 70 degrees W. to the west line of said grant as the north line of said grant."

The real issue in this case was the identity of the two hackberries as the original corner, and the fundamental question here, therefore, is the legal test of that issue. The measure whereby the jury was to determine the issue of the identity of the two hackberries.

The way to determine whether the Bigham hackberries, or some other hackberries, were the original corner was to follow the steps of the surveyor.

The testimony of T. W. Johnson, the surveyor who made the survey of the Moreno grant, is positive that he began the survey on the Pecan, on the left margin of the San Andres, below where the creek enters it, and opposite to the mouth of the creek, and ran thence N. 22 degrees E. to a stake in the prairie 22,960 varas, and that then he ran the N., or back line (back of the river), S. 70 degrees, E. 12,580 varas, to two hackberries. This statement is corroborated by the description in the grant. But, more than that, it is directly corroborated by the witness, William Duty, who was with him when the lines were run, as also to

the further fact that the E. line was run, but not measured (though estimated).

It is well settled that upon a question of boundary natural objects control artificial objects; that artificial objects control corners and distances; that course controls distance; and that course and distances control quantity. Now, the practical effect of the change of the course in this case is that quantity controls course and distance, and that distance will fix a natural object in despite of course.

The rule is well settled that the track of the surveyor shall be followed if possible. In this case there is no difficulty in doing this, and, if this were done as to the first and second lines, which were the only two actually measured (F. W. Johnson, original surveyor, f. 38, p. 17; William Duty, chain-bearer, f. 41, p. 18), as is shown by this testimony, then there would have been no possibility of cornering on the Bigham hackberries. For, starting at the Pecan, opposite the mouth of the Lampasas, and following the course and distance of the first line to its terminus in the prairie, and from thence running the course and distance of the second line, which were the only ones measured, it would have intersected the east line in a place where there were many hackberries, though the corner was not found. And from this point of intersection, running south 20 degrees W. along the east line, which was originally run (but not measured), but was well marked above the Bigham hackberries. (See John W. Turner's testimony, p. 22, f. 52.)

It was error in the court, in the presence of this undisputed testimony, to say to the jury:

"You may begin at the S. W. corner, on the river, and find the N. W. corner by the course and distance of the first line, and extend the second line for the north,

or back line, so as to intersect the east line (a line run N. 20 E. from the S. E. corner on the river, or you may begin at the S. E. corner on the river, and follow thence the east line, N. 20 E. the distance called for in the field-notes for said line, 26,400 vrs., and so much further as the proof satisfies you that the line was actually marked on the ground by said original surveyor, and at the point beyond which the proof fails to show, to your satisfaction, that this line was marked by Johnson, you may fix the N. E. corner, and thence extend a line N. 70 degrees W. to the west line of said grant as the north line of said grant."

The S. E. corner on the river was established, but, as we have seen, the east line was never measured. To begin, therefore, at "the S. E. corner on the river and following thence the east line N. 20 E, the distance called for in the field-notes for said line," was to make distance control the location where the distance had not been run in the original survey, though the whole line had been marked, and where the course of the line beyond the distance was clearly marked, and also when, by following the footsteps of the surveyor, by beginning on the S. W. corner, and following the line thence north, by its course and distance the marked north line (see testimony of F. W. Johnson, original surveyor, f. 37, p. 10; William Duty, chain-bearer, f. 41, p. 18; W. T. Rucker, f. 43, p. 18; and John W. Turner, f. 53, p. 22) would have been reached, which would have led to the point where Turner found the tree with an old blaze and a part of the body of a hackberry, which had rotted, and there had intersected the marked east line from there on to the Bigham hackberries, and *through* them to the S. E. corner.

The error was in the presentation of the alternative.

1. The jury should not have been told that they could begin at the S. E. corner, though established, but should

have begun at the S. W. corner and have followed the footsteps of the surveyor. The charge of the judge is in direct contravention of the direction of this court. In the former hearing had of this case the court said:

"That the jury should have been told that, if the testimony was not sufficient to identify the two hackberries with those called for in the grant, and could not fix the N. E. corner nor the back line by any other marks or monuments, then they should fix it by the courses and distances of the first and second lines of the survey, except that the second should be extended so as to meet the recognized east line as marked and extended beyond the hackberries."

The law of Texas is that the footsteps of the surveyor must be followed.

Stafford *vs.* King, 30 Tex. R., 273.

The grant shows that the S. W. corner was the beginning, and the west line was easily identified by marks and by course and distances. The testimony of Johnson, the original surveyor, and of William Duty, who carried the chain for the original surveyor, both swear that the survey began at the *S. W.* corner. The field-notes (f. 59, p. 25) and the grant corroborated their testimony. There was a well-defined and clearly-established beginning corner. "If there be a defined beginning point, the boundaries may be established by course and distance alone."

Stafford *vs.* King, 30 Tex., 257.

Beginning at the S. W. corner, and following the course and distance, the W. and N. lines would have been followed easily to the intersection of the N. line with the E. line (which had been run and marked, but not measured), as we have seen, is fully proven. This being done, "course" would have controlled "distance," and the S. E.

corner being established, the difference in the E. line became immaterial.

The course should be first pursued, contracting or extending the distances, as the case may require, to make the survey close.

Booth *vs.* Strippleman, 26 Tex. R., 436.

2. But the instructions of the judge practically were that the jury may make a new E. line by beginning at the S. E. corner and following a line which had been run and marked (but not measured), so far as the (estimated) measurements stated in the field-notes, and stopping there make a N. E. corner. Which is not only to make distance control course, but also to ignore established lines and boundaries. Such is not the law.

It is a matter of law which juries can not control, but which must control them, that where lines of a survey have been run and can be found, they constitute the true boundaries, which must not be departed from or made to yield to course and distance, or to any less certain and definite matter of description.

George *vs.* Thomas, 16 Texas R., 85.

Bolton *vs.* Lann, 16 Texas R., 96.

3. The parenthetical description of the east line given by the judge in the charge was of itself, well calculated to warp the judgment of the jury by showing in this, the bias of his own mind. The grant, the field-notes, the testimony of the original surveyor and of the chain-carrier all show that this was a line run S. 20 degrees W., and not N., 20 degrees E.; that it was run *to* the S. E. corner on the river and not "*from* the S. E. corner on the river." The defendants were entitled to have the law charged without any indication of the judicial prejudice as to the testimony. We all know how readily juries will often spring

upon an intimation of the judge for a solution of a question of facts.

4. It was erroneous and unwarranted for the court to charge the jury upon the hypothesis, "If, however, * * * and the proof does not satisfy you that the west and north lines were actually run and measured by the original surveyor, you may fix the north line of this grant, etc.," when the original surveyor and his chain-bearer (the best evidence, Tyler on Boundaries, pp. 285–303) had positively testified that these lines had been actually run and measured, and were corroborated by the courses in the grant and in the field-notes, and when there was no evidence whatever in conflict therewith.

The court began the charge by correctly stating that the rule of law and of common sense required them to follow the footsteps of the surveyor, but when he came to charge them more in detail as to the mode of reconciling and elucidating the calls in the survey, as he did at great length, he, knowing that the beginning corner was unquestioned and that the closing corner on the river had been fixed arbitrarily, and not reached by measurement, took occasion to tell the jury that the "corner named as the 'beginning' corner does not control more than other corner actually well ascertained and established"—a proposition usually correct, but certainly erroneous under the undisputed facts before him. When the whole case admitted that the east line had *not been measured*, in speaking of it the judge inserts a parenthetical clause that it was marked on the ground by the original surveyor for more than 26,400 vrs., the distance called for in the field-notes, but omits all reference to its being marked north of the Bigham hackberries to the intersection with the marked north line. He also speaks of it as "a line run north 20 degrees east from the southeast corner on the river" whereas every iota of testimony,

and every circumstance bearing on the point, conclusively shows the fact that it was run *from* the north line *to* the *river* and was run south 20 degrees west.

When the calls in the field-notes and in the grant concurred in their order and exactly corresponded with the testimony of the original surveyor and chain-bearer, and there was no testimony whatever in conflict, it was scarcely correct to charge the jury "nor are you constrained to follow the calls of the grant in the order that said calls stand recorded in the field-notes, but you may reverse the calls and trace the lines the other way."

These matters are all excepted to and assigned for error. They all lose sight of the rule "that the jury should follow the tracks of the surveyor, so far as they could be discovered, and when these were not to be found they should follow the course and distance which he gives, so far as not to conflict with tracks that are found." And we may well continue the words of this court which follow: "Had this proposition been followed in the subsequent part of this charge, it would not have been open to criticism."

The Third Assignment of Error

Relates to the third exception, which is as follows:

The court gave, in addition to its own general charge, the following charge to the jury, by request of plaintiff's counsel, as follows:

"In seeking to retrace the lines of an old survey on the ground by following the calls in the survey, and discrepancies or inconsistent calls are found, so that the survey may be made in different ways, and it does not certainly appear from the evidence which is the true way then, because it is the duty of the party claiming under such grant to show and identify his boundaries by satisfactory evidence, the jury should adopt that way which is least

unfavorable to the other party, and in this case, if the jury are not satisfied from the evidence where on the ground the two small hackberry trees were located, and if you are not able to locate the north line of the Moreno grant *by the calls for creeks contained in the field-notes*, then you should locate the said line by course and distance *from the marked corners on the river*, both of which are undisputed; and if you find from the evidence that the *call for distance* from one of said corners will place the said north line at a different place than the *call for distance* from the other corner, and if you are unable to determine from all the evidence with reasonable certainty where the said line was in fact located, you will adopt the method of locating said line which is most favorable to the plaintiff in this case; and if, in locating the said line, you find that the Daws survey claimed by Watson is not included within the bounds of the Moreno grant claimed by defendant, you will find for the plaintiff; otherwise for the defendant."

The error in this prayer gains additional force from the fact that it follows up the erroneous and illegal theory of location laid down in the general charge as just discussed.

This prayer, as allowed, enforced the purpose of making distance superior to courses and marked lines. It also presupposed that there are "discrepancies and inconsistent calls," whereas had "the footsteps of the surveyor" been followed, as the law clearly requires, there could be no discrepancy. But let us briefly see the facts to which this prayer was applied.

Samuel Bigham, witness for plaintiff, under an order of court, surveyed the Moreno grant in 1853 or 1854. Beginning at S.W corner he identified the Pecan corner and bearing trees, and running the course and distance called for in the grant for the N.W. corner, "set up a pile of rocks in the prairie," (f. 47, p. 20). In 1889, surveyor John W. Turner (ff. 52-3, p. 22), went to this rock pile on

the N.W. corner and ran S. 70 degrees east, for 7,000 varas, where, 100 varas north of the line he was on, was a hackberry with an old blaze, and moving his compass to it and continuing to run S. 70 E. he "intersected the line he had traced from the two small hackberries" (Samuel Bigham's). "He found three trees on this (N.) line, marked with old blazes, and a few varas from this point of intersection found a tree marked with an old blaze, on the E. line, within a few feet of this point of intersection. Witness also found at this point a part of the body of a hackberry tree which had rotted." David Moore and Lubbock Moore (f. 68, p. 28), corroborate in detail this statement.

On the E. line there was a well-defined marked line from the Bigham two hackberries running N. to the point of intersection of the north line with the E. line, where J. W. Turner, as well as others, "found a tree marked with an old blaze" and "a part of the body of a hackberry tree which had rotted." R. P. Bigham says: That on the E. line N. of the Bigham two hackberries "we found five or six trees with old blazes on them." William Stephens (p. 27) says: "This E. line above the hackberry was marked as far as we went with blazes, they having the appearance of being old." Mr. Lemley (p. 26) says: "He went (on the E. line) to a large oak tree then standing about 600 or 700 varas above the place known as the 'Bigham corner.' This tree was plainly marked with an old blaze. How old witness could not say, but it had the appearance of being *very old*." J. W. Turner ran the E. line reversed from the Bigham corner. "I traced the line for about 4,000 varas. Along this line we found several trees marked with blazes." F. H. Ayers (f. 62, p. 26): "Found as many as six or seven with old blazes on them, apparently as old as any below the hackberries, and presenting no difference in appearance or age

as compared with those below. The last tree found on this line was an elm tree, within a few varas of the point of intersection with the extreme north line, as run by Turner;" and this is also the testimony of L. Moore, Web. Moore, and David Moore. Samuel Bigham, the surveyor, who undertook to make the "two hackberry" corner on the east line, says (f. 48, p. 20): "This line, if extended, *would pass between them.* Those trees were marked on the *inside* with old blazes, the blazes facing each other," etc. Who ever saw a *corner* thus marked? Had it been a N. E. corner the blazes and hacks would have been on the S. W. corner, or else they would have been doubly marked; that is, marked both on the S. and W. sides.

Samuel Bigham ran a line N. 70 degrees W., to the west line from these (his) two hackberries and "on *this* north line I found *no marks* or *indications* of a *marked line*," (f 48, p. 20.) J. W. Turner "ran a line from the two hackberries (Bigham's) N. 70 degrees W. to the western boundary line of the Moreno grant and found *no old blaze line*," (f 53, p. 22.) W. T. Rucker ran a line from the two hackberries (Bigham's) to the intersection of the west line as run from the beginning corner and found no mark on this line. On all lines run by him he found *hackberries of various sizes and ages.* John Marshall (f 56, p. 23,) "we ran a line N. 70 degrees W., to the west line from the two hackberries (Bigham's) the distance called for, and found *no marks or signs* of a line having been run there." So that from the Bigham "two hackberries" there was no north line or traces of one to be found connecting with the west line of the survey, whilst *per contra* there was a distinct and well defined north line from the N. W. corner to the N. E. corner, as ascertained by courses and distances, and this marked north line intersected the east line north of Bigham's hackberries, and from this point of intersection to the Bigham two hackberries is a well defined marked line.

Taken in connection with the fact that on no survey made from the Bigham hackberries to the west line was any old line found or any marked trees, the other facts, that the east line extended would pass between the two Bigham hackberries, that they were marked by blazes on the *inside*, and that there were no witness or bearing trees, and that the line was as well marked above as below them; with these combined facts the opinion of the witness, Samuel Bigham, that this was a corner becomes valueless. But, beside this, to make a corner here and to run to the established west line would be to ignore the course and the distance of that west line, run as it is from a well-established beginning corner, and following the footsteps of the original surveyor of the grant.

Superadded to this identification of the beginning corner and of the footsteps of the surveyor is the material fact that on the north line, as thus established, three branches and a creek are crossed as called for in the field-notes, though the first two, being probably small, are not mentioned in the grant, but the branch at 8,000 varas, the "principal branch" at 11,060 (11,600) varas are mentioned in both the field-notes and the grant.

Then, on the east line, both in the field-notes and in the grant at 3,520 varas, "Cow Creek" is called for which could not possibly have been correct if the Bigham two hackberries were the N. E. corner.

There was really no testimony to establish the two hackberries as a corner. The east line extended would have passed between them. There were no bearing trees or witnesses.

Under these circumstances it was error to instruct the jury that:

"If the jury are not satisfied from the evidence where on the ground the two small hackberry trees were lo-

cated, and if you are not able to locate the north line of the Moreno grant *by the calls for creeks contained in the field-notes*, then you should locate the said line by course and distance *from the marked corners on the river*, both of which are undisputed; and if you find from the evidence that the *call for distance* from one of said corners will place the said north line at a different place than the *call for distance* from the other corner, and if you are unable to determine from all the evidence with reasonable certainty where the said line was in fact located, you will adopt the method of locating said line which is most favorable to the plaintiff in this case; and if, in locating the said line, you find that the Daws survey claimed by Watson is not included within the bounds of the Moreno grant claimed by defendant, you will find for the plaintiff; otherwise for the defendant."

This prayer, granted at the instance of the plaintiff, in addition to the general charge, totally ignored the just influence of the fixed beginning corner and both the course and distance of the W. and N. lines as well as the E. line distinctly marked from the intersection of the N. line down to the Bigham hackberries as well as below it. It ignored the well-established fact that though the S. E. corner on the river was "marked and admitted," yet that the line to it was unmeasured, and therefore to begin at *that* corner and take the call for distance was to make distance and quantity superior to and control all other rules for making locations.

The lines actually traced on the ground, as shown by the land-marks, and not those of course and distance, (to the exclusion of the marked lines) constitute the boundary; especially is this true where the marked lines (where marked) are on the right course and require only prolongation to harmonize every other material call, and disregarding distance.

Bolton *vs.* Lane, 16 Tex. R., 112.

The reason for running to the calls for objects, over course and distance, is not only because of greater certainty, but it is more beneficial to the grantee.

Tyler on Boundaries, p. 202.

The marks on the ground, indicating the lines originally run of an old survey are the best evidence of the true location.

Idem, p. 202.

Rules in locating grant are:

First. The lines originally run.
Second. Lines run from acknowledged calls or corners.
Third. Lines run according to course and distance.

Idem., p. 282.

Where a marked line can be found it shall be pursued as far as may be done in its whole extent; but if it does not extend to the point of intersection, then it must be continued until the intersection is made, taking the course called or required by the deed.

George *vs.* Thomas, 16 Tex. R., 89.

The identification of the actual survey in the purpose of the rules of evidence. The footsteps of the surveyors must be followed.

Stafford *vs.* King, 30 Tex. R., 257.

A departure from calls, which will make the survey repugnant to the known call, shall not be made.

Anderson *vs.* Stamps, 19 Tex. R., 465.

Established corners and lines of the survey actually traced upon the grounds must control an object which is uncertain and unknown.

Herbert *vs.* Buillett, 9 Tex. R.
George *vs.* Thomas, 16 Tex. R., 7.
Bass *vs.* Mitchell, 22 Texas.

The surveyor who ran the line, or his chainmen, are the best witnesses to establish the true line as run.

Tyler on Boundaries, pp. 285-303.

To authorize the jury to locate the N. "line, by course and distance, from the marked corners on the river," when all the proof showed that the E. line had not been measured, and that it had simply been run, and the S. E. corner (things "undisputed") had simply been fixed as the end of this run, but unmeasured, E. line, was equivalent to directing the jury to make quantity the basis of locating the boundary of the grant.

Where the quantity of a tract of land is given, as well as the metes and bounds given, the metes and bounds will control the location, although the metes and bounds contain more or less than the quantity called for.

Barclay *et al. vs.* Howell's lessee, 6 Peters, 498.

Where the boundaries of land are fixed by unquestionable monuments, although neither courses, nor distances, nor the quantities of land correspond, the monuments must govern.

Perman *vs.* Mead, 6 Mass., 131.

But still more authority to locate by course and distance from the S. E. corner, was to reverse the third line and run it backward, instead of beginning on the S. W. corner, where the surveyor began, and following his course around.

A *posterior* line will *never be reversed* for the purpose of showing the termination of a prior one, unless the description of the posterior be more specific than that of the prior, and unless from the posterior a mistake in the prior can be clearly shown.

Harry *vs.* Graham, 1 Dev. & Battle, 76.

If it appear that a subsequent line was actually run

and marked, a prior line may be extended to it, in order to ascertain the true corner.

Ring *vs.* King, 4 Dev. & Bat., 164.

A survey must be closed in some way or other. If this can be done by following the course of proper distance, then it would seem that distance should prevail, but when the distance falls short of closing, and the course will do it, the reason for observing distance fails.

Doe *vs.* King, 3 How. (Miss.), 126.

Where, in describing a boundary line, another known line is called for, and the distance gives out before reaching the line called for, the distance is to be disregarded.

Gilchrist *vs.* McLaughlin, 7 Iredell, 310.

The great principle which runs through all the rules of location is that where you can not give effect to every part of the description, that which is more fixed and certain shall prevail over that which is less so.

Johnson *vs.* McMillan, 1 Strobart, 143.

The footsteps of the surveyor must be followed.

Stafford *vs.* King, 30 Tex. R., 273.

The courses should be first pursued, contracting or extending the distances, as the case may require, to make the survey close.

Booth *vs.* Strippleman, 26 Tex. R., 436.

The location of a corner is a mixed question of law and fact.

Castleman *vs.* Pouton, 51 Tex. R., 84.

A call for a corner which is ascertained by marked lines intersecting at the corner will prevail over a call for quantity and distance.

Buford *vs.* Gray, 51 Tex., 331.

The courses should be first pursued, as the case may require, to make the survey close.

Booth *vs.* Strippleman, 26 Tex. R., 436.

Established corners and lines of the survey actually traced upon the ground *must control.*

Bass *vs.* Michell, 22 Tex. R., 535.

Lines must be run to the known boundaries, instead of terminating by distance, and the marked line would control both course and distance.

Idem, 208.

After the error which we allege and have just discussed, the judge said in his charge: "And if you find from the evidence that the call for distance from one of said corners will place the said north line at a different place than the call for distance from the other corner, and if you are unable to determine from all the evidence, with reasonable certainty, where the said line was in fact located, you will adopt the method of locating said line which is most favorable to the *plaintiff* in this case."

This was to shift the burden of proof from the plaintiff to the defendant. This must have been based on the stipulations of the parties, and, if so, it was upon an erroneous understanding of them. The first stipulation is dated April 14, 1879 (f. 18, p. 7), and begins: "In this cause it is agreed, *for* the purpose of a trial," that the plaintiff may read in evidence certified copy of the Daws patent and defendants' translated copy of the Maximo Moreno 11-league grant issued in 1833, and the object of this agreement is to relieve parties of the necessity of deraigning title from said original grantees.

A trial was had and a mistrial resulted.

At the April term, 1880, an agreement was filed (f. 21, p. 9), to the effect that the plaintiff was entitled to all the

right, title, and interest granted by the State of Texas to the heirs of Walter W. Daws on September 16, A. D. 1850, etc., "but defendants say that said patent is covered by the Moreno 11-league grant, which is an older and superior title to that of plaintiff's."

This stipulation begins: "It is agreed and admitted by the defendants, *for the purpose of this trial at this term of the court, etc.*"

A mistrial again resulted.

Then the case was removed to the United States Circuit Court, and in that court, on the 8th of October, 1880, a trial was had before a jury and a mistrial was adjudged.

Then, as the record discloses, on the 26th of April, 1886, a trial was had which resulted in a verdict for the plaintiff, and this writ of error was sued out.

No other or further stipulation or admission as to title appears in the record.

In the bill of exceptions of defendants (f. 36, p. 16), it appears that plaintiff read his patent and defendant read his grant and "it was admitted that the plaintiff and defendants, respectively, held and deraigned title from and under the patent and grant above referred to, according to agreement in writing in this cause filed."

In all of this we seek in vain for anything to shift the *onus probandi* from plaintiff to defendants.

The plaintiff was bound to prove his case. Now, what was his case in the face of these admissions as to the mode of deraigning title? Clearly it was to prove that his patent was not embraced in the Moreno grant. The location of the north line becomes on the trial the pivotal issue, and if the jury is to "adopt the method of locating said line, which is most favorable to the *plaintiff* in this case," then is it no longer true that "he who alleges must prove."

But, moreover, it must be borne in mind that this is an

ejectment suit, and "it is a universal rule that the party claiming a right to lands must recover, if at all, on the strength of his own title, and not on the defects in that of his adversary.

Wait's Action and Defenses, third volume, page 12.
Adams on Ejectment, 30.
Wallace *vs.* Swinton, 64 N. Y. (19 Sick.), 188.
Gaulding *vs.* Clark, 34 N. H., 148.
Boylan *vs.* Meeker, 4 Dutch, 274.
Butler *vs.* Davis, 5 Nebr., 52.

The Fourth Assignment of Error

relates to the fourth exception, which was as to the refusal of this prayer.

The defendant, by his counsel, asked the court to give the following charge to the jury, to wit:

"If the proof does not satisfy you that the two hackberries (said to have been found by Bigham in 1854, 560 varas north, 20 east from the point where the distance gives out, measured from the lower river corner) have been identified as the same which were marked by the original surveyor for the northeast corner of the Moreno survey, then, if they believe, from the evidence, that the western and the northern lines were run according to the field-notes, they should find for the defendant."

This prayer is stated in as simple form as language can be made, for if the jury was satisfied that the Bigham hackberries were the northeast corner, that was an end of the business. But if they were not satisfied that the two hackberries were identified as those marked by the surveyor for the northeast corner of the Moreno grant, then there was an inevitable alternative, if the jury had any faith in human testimony, and that was that the surveyor began at the southwest corner, opposite the mouth of the Lampasas creek, and ran and located the west and

north line according to the description of the grant. And, if this were true, Bigham corner or not, the Daws patent was inside that north line. It is true the jury might not be satisfied that the Bigham hackberries were the northeast corner and yet not believe that the north and west lines were according to the field-notes, but belief in both propositions was impossible, for they were incompatible.

The prayer properly made want of satisfaction with the identification of the Bigham hackberries a condition precedent "to believe from the evidence" the second proposition. It was a question of fact for the jury whether the Bigham corner was identified; also whether the first two lines were run according to the field-notes. If the Bigham hackberries were out of the way, then the question recurred as to the first and second lines.

It was admitted, and it was proven by the surveyors on both sides, that if the north line was run according to the field-notes of the grant it included the Daws patent within the Moreno grant.

To locate the grant in accordance with the known lines following the footsteps of the surveyor is the settled rule and accords with the conclusions of common sense and the very reason of the thing derived from long experience. It is not only the rule of location by general judicial interpretation, but it was specifically interpreted by this court, and by it applied to this case when previously here. It was superior to the charge of the court that the jury might reverse the course of the east line and by taking a distance which had been "guessed at" upon a line which, although run and marked, had never been measured, and at the end of that distance make a corner. But this prayer waives present consideration of the previous errors of the court below, and simply asks that the correct rule of location may be adopted, provided the jury

was not satisfied with the identification of the Bigham corner.

The prayer was essential to the rights of the defendant as it would explain and elucidate the general charge of the judge by fairly submitting to the jury the proper effect of the location of the west and north lines, if the jury believed they were run according to the field-notes, and were not satisfied with the identification of the Bigham hackberries as the original northeast corner, and this court said "the request would have been a proper one had it been qualified with the condition that the two hackberry trees were not satisfactorily identified as those called for in the Moreno grant."

The effect of the refusal of the prayer was practically, after the discussion of different modes of locating the grant, to disavow and annul what the court has said in the opening as to following the tracks of the surveyor and to leave upon the minds of the jury the belief that other legal principles which had been discussed obviated the obligation to consider the west and north lines in any event.

That it was refused after all that had been charged as to the east line and the Bigham hackberries almost suggests judicial unfairness.

When this case was here before there was an exception based upon the refusal of a prayer similar to this, except that it had not the condition which this has, "that the two hackberry trees were not satisfactorily identified as those called for in the Moreno grant." (113 U. S., 606.) And this court says (p. 607) "The request, therefore, should have been that if the jury did not believe the hackberries were the same, then, if they believed that the two lines were run according to the field-notes, they must find for the defendant." The present prayer was fairly and fully framed in accordance with the views of this court, but it was refused.

The Fifth Assignment of Error

relates to the fifth exception, which was as to the refusal of this prayer.

And the defendant asked the court to charge the jury further as follows, to wit:

"That if the testimony is not sufficient to identify the two hackberries, said to have been found by Bigham in 1854, with those called for in the field-notes of Maximo Moreno grant as the true northeast corner, as fixed on the ground by the original surveyor in 1833, and if the jury can not fix the northeast corner nor the back line by any other marks or monuments, then they will fix it by the corner and distance of the first and second lines of the survey, except that the second line of the survey should be extended, so as to meet the recognized east line, as marked and extended beyond the hackberries."

This prayer is more comprehensive than the preceding one, and by negativing more conditions contracts the real issue as to the question involved. The question involved was the location of the Moreno grant, and the issue upon it was the true rule of location to be adopted under the circumstances of the case. The court had in its general charge correctly laid down the requirement of "the rule of law and of common sense to follow the tracks of the surveyor on the ground" only to call the jury away from its consideration by advising them that they need not begin at the beginning corner, and might (capriciously) reverse calls and trace the lines the other way; and could begin at a corner which had been fixed arbitrarily without measurements, and make a corner upon an unmeasured line by tracing it for the *estimated* distance and ignoring its blazed extension, which was well identified. That from a corner thus located a line might be run where no trace of a line was to be found to be

substituted for a parallel line marked and identified by course and distance. Now, however, after all of this has been talked into the jury, the defendant prays that the jury may be charged that if the identity of the Bigham hackberries on the northeast corner is not sufficient, and if they can not fix the north line and the northeast corner "by any other marks or monuments, (that) then they will fix it by the corner and distances of the first and second lines of the survey." This prayer was refused. No modification of it even was given. The refusal was absolute.

When this case was here before this court was very explicit as to what the instruction should have been to the jury, and this prayer is framed almost in *totidem verbis* as the direction of this court, and we desire now to call your attention particularly to the language you then used, at the bottom of page 607 and on page 608, as showing more clearly and forcibly than we can possibly do the reasons which made the allowance of this prayer essential to the just protection of the rights of the defendant.

Unquestionably the charge was sound and correct in itself, and in view of the rest of the charge the refusal of this prayer was well calculated to prejudice the case of the defendant.

The Sixth Assignment of Error

Relates to the sixth exception, and it was taken to a refusal to charge the jury to disregard certain evidences as follows:

"The defendant asks the court to charge the jury as follows:

"The jury are charged that the field-notes which entered into and formed part of the title originally made to Maximo Moreno, are those which are to control them in their findings in respect to the work of the surveyor in

the field; that they will not consider any field-notes of a survey purporting to have been made for Sawyer, unless the evidence should show that the field-notes last mentioned entered into and were incorporated in the grant made to Moreno; and unless the proof shows that the Sawyer field-notes are those which entered into and formed part of the title to Moreno, then they will disregard them and look only to the field-notes in the title issued to Moreno."

Which charge the court refused to give to the jury; to which refusal the defendant, by his counsel, then and there excepted and still excepts, and pray that the same will be allowed and enrolled as such, as bill of exception No. 6, which is accordingly done.

It is quite clear that unless the field-notes of the survey purporting to have been made for Sawyer entered into and became a part of the Moreno grant under which the defendant claimed title, they were not competent as evidence, unless, indeed, they were shown by the evidence to have entered into and made a part of the title of the Moreno grant. These field-notes, unless directly connected by proof with the defendant's title, must come under the general classification of "hearsay," and are obnoxious to all of the rules relating to such evidence.

Of course an objection to their introduction would have been premature, as the purpose of their introduction, or what they contained really, could not be anticipated; but when they are spread upon the record, it is patent that they have no connection with or bearing upon the case, as no evidence, whatever, was introduced to connect them with it. The only course for the defendant to adopt was to ask the instruction which he did in relation to them, and we submit that it was error to refuse it.

WM. E. EARLE,
Attorney for Plaintiff in Error.

KELLOGG BUILDING, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 119.

F. H. AYER ET AL., PLAINTIFFS IN ERROR,

vs.

A. E. WATSON, DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the Northern District of Texas.

BRIEF IN REPLY FOR PLAINTIFFS IN ERROR.

In the brief for the defendant in error is an elaborate discussion to sustain the admission of the deposition of Johnson, which had been taken in another suit, between other parties in 1860, the admission whereof in this case was excepted to and is the subject of the First Assignment of Error herein.

The argument of counsel is based upon the proposition that, "as the question is one in reference to land titles in Texas, the rule as there laid down by the highest court of the State must govern."

It is respectfully submitted that this proposition is wholly erroneous. It rests upon the confusion of the

effect of the decisions of a State court, which have become "fixed rules of property."

It is true that, with certain specific limitations, the rule as to the *competency of witnesses* is by statute made the same as in the State court in which the Federal court is held (12 S. L., 588). The rules of evidence in the courts of the United States are those which were of force at the date of the adoption of the Judiciary Act (September 24, 1789), and the amendments and modifications thereof adopted since then by express statute. The jealous care with which Congress has avoided the adoption into the Federal procedure of the rules of evidence of the States is well illustrated by a provision in the "act to further the administration of justice," enacted June 1, 1872 (17 S. L., 196). In the fifth section of that act it is provided that the pleadings and practice of the United States courts (except in equity and admiralty) shall be conformed to those of the States, respectively, in which the courts were held, but even while making this broad change, there is a significant and important limitation, as follows:

"Provided, however, nothing herein contained shall alter the rules of evidence under the laws of the United States, and as practiced in the courts thereof."

The law of the United States as to the admission of depositions taken in other suits between other and different parties not privies, is readily seen in the following cases:

In Rutherford *vs.* Geddes (4 Wall., 220) the rubric is as follows:

"1. Depositions can not be used on the trial of a suit in admiralty, which were taken in another suit concerning the same subject-matter, where the party against whom they are offered was not a party to the suit in which they

were taken, nor privy to any such party, and had no right to cross-examine the witnesses.

"2. Nor can depositions be read in admiralty any more than at common law, without some sufficient reason being shown why the witness was not produced at the hearing."

In Marine Insurance Company *vs.* Hodgson (6 Cr., 220) the court below ruled out a deposition, and this ruling being assigned for error, this court said:

"But if it were proper, for the purpose of discrediting any testimony which had been offered by the plaintiff, to show where *The Hope* had been taken, it is not thought that the Circuit Court erred in instructing the jury that the deposition of Murray was not competent evidence to prove that fact. If all the proceedings in the admiralty had been read by the plaintiff, without any previous agreement on the part of the defendants, to save every objection to their contents, excepting the matter of authentication, the court will not say that the defendants might not have insisted on using any deposition, among the papers, which made in their favor; but, as the plaintiff could have read them for no other purpose than to prove the libel and condemnation, and must have attempted to prove no other fact by them, for which purpose it is expressly stated that they were offered, and as the defendants had, by their agreement, explicitly reserved to themselves every objection to their contents, it does not appear reasonable to permit them to select a deposition as evidence for them, while the plaintiff could not have made use of that, or any other, if ever so favorable to himself. The Circuit Court, therefore, did not err in the instruction which it gave to the jury on this subject."

In Tappan *vs.* Beardsley (10 Wallace, 427), the rubric is as follows:

1. It seems that, to establish the fact that a certain suit was brought, or the time of its commencement, the record of it may be used against one who was no party to it, but

only so much as is necessary for that purpose is admissible.

2. *Depositions which are incorporated into such a record are not admissible in another suit, where the witnesses are competent* and can be procured in the second suit.

3. The right and the opportunity in a person *to cross-examine are essential to the use of such depositions against him.*

And, in concluding the opinion, this court says:

"Upon this question the case of the Marine Insurance Company *vs.* Hodgson, Rutherford *vs.* Geddes, and Laybourn *vs.* Crisp are directly in point; and the authorities cited by Mr. Taylor in his work on Evidence fully sustain the proposition laid down by him, that depositions in chancery can only be read when the bill shows *that the cause was against the same parties or those claiming in privity with them.*

"For this error the judgment of the Circuit Court is REVERSED AND A NEW TRIAL AWARDED."

When this case had been thrice tried in the lifetime of the witness, and his testimony was before it, and no reference made to this deposition nor to the subject-matter in any way, and that after death had closed his lips to all explanation and cut off the party from cross-examination in relation thereto, that a deposition, taken in 1861, in another and different suit, between other parties, and with whom there is no privity, should be resurrected, after twenty-five years of slumber, to contradict the testimony of the deceased witness, is a proposition abhorrent to every principle of reason and justice. It is not sanctioned by either the California cases nor the Texas cases cited.

Every case must be proven by the best evidence whereof it is susceptible. The surveyor and the chain-

bearers are in all matters of survey the best witnesses. In their absence, and the inability to produce them as witnesses to settle a disputed location the question of boundary is so far a matter of hearsay as often to warrant courts in accepting testimony as to what the deceased surveyors and chain-bearers have been heard to state in relation to the identity of location.

But such is not this case. The original surveyor was examined in it by deposition, and it was before the court. It had been on three previous trials. He died without the deposition of 1861, or its subject-matter being in anywise referred to. The deposition of 1861 was not produced when that of 1879 was taken. The witness had no opportunity of explaining his previous statements.

The plaintiff in error never had any opportunity of cross-examining him on the statements of the 1861 deposition.

Besides William Duty, one of the original chain-bearers, was orally examined on the trial, and there is no conflict between his testimony and that of the deposition of 1879, and both were corroborated by the calls in the field-notes and the grant.

The deposition, therefore, was not wanted *to supply the absence* of "the best evidence," the only case in which hearsay is ever warranted, but it was put in either to contradict the deposition of 1879 or as original conflicting evidence whereon to base prayers.

The language of this court, in Lucas *vs.* Brooks (18 Wall., 454), seems *apropos:*

"A judge well performs his duty when he guards the jury against having their attention *diverted* from the *real issue* by the introduction of immaterial evidence."

To say that "it does not appear that its admission worked any harm to the defendant, or was such an error as should compel still another trial," is to beg the whole question. The erroneous admission of this evidence has led the court below into a string of errors, both in the general charge and in the refusal of the prayers of the defendant, besides the error *per se* in confusing the minds of the jury, and leading it from the true issue in the case to consider incompetent and misleading evidence.

This admission of incompetent evidence furnishes the only pretext upon which the charge (in the general charge) was given, which begins "(If) the proof does not satisfy you that the west and north lines were actually measured by the original surveyor (then) you may fix the north line of this grant in either of these two ways." One of these two ways was to begin at the southeast corner.

This charge then based upon and rested solely on this clearly incompetent testimony entirely neutralized what the court properly said in the beginning of the charge as to following "the tracks of the surveyor on the ground, so far as the proof enables you to follow them on the ground with reasonable certainty."

This incompetent deposition cast doubt on the competent testimony of the original surveyor that the west and north lines were actually run and measured upon the ground, beginning at the southwest corner, which was corroborated by Duty, the chain-bearer, and by the field-notes.

This incompetent deposition furnished the semblance of a reason for refusing the two prayers of the defendant, which were framed upon the former decision of this court.

This incompetent deposition suggested to the jury that the east line was or might have been the first line run in opposition to the proof of the regular deposition of John-

son, the surveyor, and the testimony of Duty and the field-notes.

It was confusing; it was misleading, and it was wrong in itself, and if it stood alone would, we respectfully but earnestly submit, constitute ample ground for remanding the cause.

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Attorney for Plaintiffs in Error.

Kellogg Building,

WASHINGTON, D. C.

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[November 15, 1889.]

Supreme Court of the United States.

OCTOBER TERM.

AYERS
vs.
WATSON.
} **No. 119.**

W. HALLETT PHILLIPS,
For Defendant in Error.

R. O. Polkinhorn, Printer, 632 & 634 D Street, N. W.

Supreme Court of the United States.

OCTOBER TERM.

AYERS
vs.
WATSON.
No. 119.

Brief of W. Hallett Phillips for Defendant in Error.

This case was once here before on writ of error prosecuted by Ayers. We give the statement of the facts contained in the opinion of this Court in Ayres *vs.* Watson, in 113 U. S., 594.

> This was an action of trespass to try title of certain land in Bell County, Texas, originally brought in the District court of said county by Watson, the defendant in error, against the plaintiffs in error and one Anderson. The land claimed was described in the petition as a tract lying in said county of Bell, about fifteen miles northeast by north from the three forks of Little River, stating the boundaries. The defendants excepted to the petition for insufficiency of law, and also pleaded not guilty. One of them, Frank Ayers, pleaded specially that he was owner in fee simple of a tract of eleven leagues granted by the government of Coahuila and Texas to Maximo Moreno in the year 1833, describing its metes and bounds; and he alleged that the land

described in the plaintiff's petition and claimed by him under some pretended patent from the State of Texas to the heirs of one W. W. Daws, deceased, was embraced within the boundaries of said eleven-league grant, which was an elder and superior title.

By agreement of the parties, the patents or grants under which they respectively claimed, as set forth in the petition and answer, and their deraignment of title under the same, were admitted on the trial, and the controversy was reduced to the simple question of locating the surveys on the ground. The tract claimed by the plaintiff, Watson, was one-third of a league, patented to the heirs of Walter W. Daws, and its position was well ascertained and defined; and the question was, whether it was or was not embraced in the older survey of the eleven-league grant, owned by the defendant Ayers, which was described in the field notes of the grant, as follows, viz; "situated on the left margin of the river San Andres, below the point where the creek called Lampass enters said river on its opposite margin, and having the lines, limits, boundaries, and land marks following, to wit: Beginning the survey at a pecan (nogal) fronting the mouth of the aforesaid creek, which pecan serves as a land-mark for the first corner, and from which 14 varas to the north 59° west there is a hackberry 24 inches diameter and 15 varas to the south 34° west there is an elm 12 inches diameter; a line was run to the north 22° east 22,960 varas and planted a stake in the prairie for the second corner. Thence another line was run to the south 70° east, at 8,000 varas crossed a branch of the creek called Cow Creek, at 10,600 varas crossed the principal branch of said creek, and at 12,580 varas two small hackberries served as land-mark for the third corner. Thence another line was run to the south 20° west, and at 3,520 varas crossed the said Cow Creek, and

26,400 varas to a tree (palo) on the aforesaid margin of the river San Andres, which tree is called in English 'box-elder,' from which 7 varas to the south 28° west there is a cottonwood with two trunks, and 16 varas to the south 11° east there is an elm 15 inches diameter. Thence following up the river by its meanders to the beginning point, and comprising a plane area of eleven leagues of land or 275 millions of square varas."

This tract extended backward from the river, in a northerly direction, from twelve to fourteen miles, and, as that was about the distance from the river of the tract claimed by the plaintiff, the question was whether it embraced the latter. If it did, being held by an elder title, the defendant would be entitled to the verdict; if not, the plaintiff would be entitled to it. Under the concessions made by the parties, the burden of proof was devolved upon the defendant to show that this eleven-league tract extended so far back from the river as to embrace the plaintiff's land, or any part of it.

The evidence was that of surveyors and chain-bearers, and tended to show the following facts, namely, that, by commencing at the beginning point of the Moreno grant (the position of which was not disputed), and following the lines of the survey by courses and distances only, it would embrace nearly the whole of the Daws patent; but run in this way, the lines would not coincide with certain well ascertained monuments, either called for in the grant, or conceded to mark and identify the footsteps of the surveyor who originally located it in 1833. For example, the easterly line of the survey, which is identified by several miles of marked trees, and the southern terminus of which, at the river San Andres, is fixed by agreement of the parties and by monuments called for in the grant itself, is situated about 570 varas, or three-tenths

of a mile, east of what its position would be if the courses and distances were followed ; and, as fixed by such monuments, if the tract were made to extend as far back from the river as the defendant contends, it would contain fourteen or fifteen square leagues instead of eleven. But the point of greatest importance was to fix the position of the northern boundary line of the tract, to ascertain whether it took in or crossed the Daw's patent. This was a line described in the survey as running from the stake set in the prairie, south 70° east, 12,580 varas, or Mexican, yards (about 6⅞ miles), to two small hackberry trees. Of course, these hackbarries marked the northern terminus of the eastern boundary line, before mentioned, which commenced from them; and two such trees, having all the old marks and blazes requisite, were found in said eastern boundary line (and were adopted as the north-east corner of the tract) in the course of an official survey, made by the order of the court in 1854, being at a distance of 26,960 varas from the river San Andres—the distance given in the field notes of the grant, based on calculation and not actual measurement, being 26,400 varas ; whereas, by following the courses and distances mentioned in the grant, the easterly line, extended to the river, would be 30,760 varas in length, and, as before stated, would not coincide with the marked line conceded to be the easterly line as run at the original survey. If the northerly line of the Moreno tract should be located and fixed by taking for its eastern terminus the two hackberry trees referred to, it would not reach the plaintiff's land, but would pass south of it a full half of a mile. The defendant, Ayers, however, disputed the identity of these hackberry trees with those called for in the Moreno grant, and claimed that the grant extended a mile and a half, or more, farther north, which, indeed, it would do according to the length of

the first course measured from the beginning corner; and he adduced testimony to show some marked trees north of the two hackberries, in the line of the eastern boundary, corresponding to his views, and some marks along the northerly or back line, claimed by him to be the true line.

The controversy, therefore, was substantially reduced to this alternative, namely: If the first line of the survey taken according to its course and distance should govern the position of the back line, the Moreno tract would include the greater part of the Daw's patent; but if the two hackberry trees, discovered in 1854, were to be regarded as identical with the trees referred to in the field notes of the survey for the northeast corner thereof, then they would fix the position of the back line, and the Moreno grant would not include any part of the Daw's patent.

The judgment in favor of Watson was reversed on a single point involved in the charge of the Court. All the other exceptions were overruled.

The judge below had charged that if the jury were not able to fix the disputed lines, or the disputed portion of the line, with reasonable certainty, they might locate the back, or the northerly line, so as to embrace eleven leagues between it and the river, and between the east and west lines, as acknowledged by the parties.

In thus charging, this Court held there was error. It was allowing the jury to make the location of the back line depend on the quantity of the land enclosed, if they could not fix it from the evidence.

The case having been retried, there was again a verdict and judgment for the plaintiff Watson, to

reverse which Ayers for a second time, brings the case to this Court.

The controversy is the same as when the case was first here, and the inquiry is as to the location of the northern line of the Moreno survey and the ascertainment of the identity of the two hackberry trees called for in the field notes of that survey, for the northeast corner thereof.

Before proceeding to a discussion of the charge given and the requests of the defendant, which were refused, the question of the admissibility of certain evidence, the admission of which was excepted to by the defendant, should first be noticed. This ruling constitutes defendant's first exception.

Plaintiff read in evidence the patent from the State of Texas, dated 16th September, 1850, to the land claimed by him, having the metes and boundaries as set forth in his petition.

The defendant read in evidence the original grant to Maximo Moreno, dated 18th October, 1833, containing the metes and boundaries as set forth in defendants' first amended original answer, filed April 29, 1879.

It was admitted that the plaintiff and defendants, respectively, held and deraigned title from and under the patent and grant above referred to, according to agreement in writing in this cause filed.

It was admitted by both parties, that the upper and lower corners on the river of the Maximo Moreno eleven-league grant, are extant as called for in the original grant to Maximo Moreno, and their corners are not in dispute.

The defendant read in evidence the deposition of F. W. Johnson, taken in 1878 and 1880, in which he testified that he was principle surveyor for Austin's colony in 1833, and that year began at a place where what is known as the reserve crosses San Andres or Little River, and, for the purpose of getting a base line upon which to make corner, he measured upward to the junction of the Salado, Lampasas, and Leon rivers, called the three forks, in what is now Bell County, Texas. He meandered the river upwards on both sides to that point. On the east side of the San Andres river, opposite where the Lampasas River enters the San Andres river, he began to make a series of surveys on the north side of the San Andres river. The first survey made was the Maximo Moreno eleven-league survey. This survey was commenced at the point opposite the mouth of the Lampasas river, as called for in the field notes of the grant, and a line was run thence on the course called for in the grant the distance called for, the chain being used to measure the distance. The northwest or second corner called for in the grant was thus established by him, the distance giving out in the prairie. In running the west line, I made an offset to avoid crossing the Leon River, which was about fifty or sixty vrs. wide. This offset was made soon after leaving the beginning corner, there being a peculiar bend in the river at that point. From the northwest corner thus established the second line was run the course and distance called for in the grant. Several streams were crossed on this line at distances not now recollected, and the northeast corner established on two small hackberries in Cow Creek bottom. From the northeast or third corner so established a line was

run in the course called for in the grant to San Andres River. This last line was marked out but not measured, because it was not usual or necessary to measure the closing line.

It was admitted by defendant that the distance as measured on the ground from the northeast corner to a creek called for in the grant was some four thousand varas more than the distance called for—that is, the distance is 7,500 instead of 3,500 vrs.; and, on cross-examination, being asked to account for the discrepancy, said the distances called on that line were not measures, but guessed at. No part of the east line was measured. The exterior lines were marked with blazes. The corner trees and bearing trees, where there were such, were marked with blazes, with two hacks above and two below. In answer to question, on cross examination, he said that he did not begin the survey at the southeast corner, but he began at the southwest corner, at the three forks at the mouth of the Lampasas, and actually traced the lines in the order set forth in the field-notes. The field-book containing the same, which I kept, I examined, which I don't remember to have examined until a month ago, and as hereinbefore stated.

The plaintiff, in rebuttal to Johnson's testimony, as above set forth, it appearing that said Johnson died in 1884, offered to read in evidence a deposition of Johnson, taken in 1860, in a certain suit then pending in Bell county, Texas, wherein David Ayers was plaintiff and Lancaster was defendant, in which he stated in answer to question therein propounded that he began the Moreno survey at the southeast corner and ran thence northerly. The

north line was then run westwardly, and the third, if run at all, was run southwardly to the river. I am of the opinion that no western line was run, but was left open; but the eastern and northern lines were run and measured. It was not usual to measure the closing line. To the reading of which last-mentioned deposition, proven to be in the handwriting of Johnson, taken in 1860, the defendant objected, upon the ground that the deposition had been taken in another and different cause, between other parties, before the institution of this suit; and the same witness having testified in answer to interrogatories and cross-interrogatories propounded herein in 1877 and 1880 respectively, it was not competent as original evidence nor admissible to contradict or impeach the testimony of the witness Johnson, as given in his deposition read by the defendant, notwithstanding the death of Johnson. R. 17.

We submit that the deposition of Johnson was properly admitted as evidence to go to the jury with the other evidence in the case, in order to enable them to ascertain the disputed lines of the Moreno survey, which had been run by the party making the deposition.

The precise point was determined in favor of the admissibility of the evidence, by Mr. Justice FIELD, in delivering the opinion of the Supreme Court of California in the case of *Morton* vs. *Folger*, 15 Cal., 277.

It was on the authority of that case, that the evidence was admitted, and it so completely covers the point that we refer to it at large.

In explanation of the conflict of boundaries arising under the Souter grant to the land claimed by the respective parties, the deposition of the deceased surveyor employed by Souter, taken in a different action between different parties, was admitted in evidence as to the position of the southern boundary of the survey.

The question, say the court, is thus presented, whether the deposition of a surveyor who ran the boundary lines of a grant taken in one action is admissible in another action between different parties, as to the location of such lines, after his death.

The court at great length examined the authorities and conclude that the deposition was admissible.

In this country, they observe, the admissibility of this kind of evidence is carried to much greater length than in England. In the survey of large tracts, landmarks are often formed of a temporary character, which, in the progress of settlement and improvement, disappear, leaving their location to rest only in the recollection of the neighborhood. In such cases evidence of reputation or hearsay is received from necessity for the protection of the rights of parties. It is not necessary, however, according to the authorities in the majority of the American States, that the hearsay to entitle it to be received, should be general or relate to boundaries in which the public or numerous persons are interested. It may be limited to particular facts embracing the declarations of a single individual, provided such individual had, from his situation, the means of knowledge and was disinterested in the matter, and may

relate only to the boundary of a private estate. Its admissibility cannot, of course, be affected by the fact, that it is reduced to writing and was made under the solemnity of an oath in a judicial proceeding. These circumstances, if they can have any weight, must augment the confidence expressed in the accuracy of the declarations.

The question was re-examined and the previous decision affirmed in *Cornwall* vs. *Culver*, 16 Cal., 428.

As the question is one in reference to land titles in Texas, the rule, as there laid down by the highest court of the State must govern.

According to the long established rule of evidence in that State, the deposition of Johnson was admissible.

In *George* vs. *Thomas*, 16 Tex., 92, witness testified to what Tone the surveyor said as to the dividing line of a survey. The objection to this was overruled, the court holding that he was a public surveyor, and his declarations were clearly admissible.

> "On these questions of boundary, the court have gone much further and under certain restrictions, have freely admitted hearsay evidence to establish old surveys and boundary lines."

In *Stroud* vs. *Springfield*, 28 T., 665, certain notes of a deceased surveyor, found among his private papers, were offered. The court say:

> "If the genuineness of these papers had been sufficiently proved, in our opinion, they would have been admissible in evidence as the declara-

tions of the party making them, for the purpose of aiding in the ascertainment of the boundaries of the Powell league."

In *Speer* vs. *Coate*, in reference to the declaration of a deceased *chain carrier*, who had pointed out to the witness a certain corner tree of the survey, it is said by the court: "It cannot be doubted at this day, that the declaration of deceased persons who shall appear to have been in a situation to possess the information, and are not interested, shall, on a question of boundary, be received in evidence.

"The same doctrine is, if possible, more strongly asserted in *Blythe* vs. *Sunderland*, where the declarations of a deceased surveyor, who had pointed out to the witness a corner of the survey, were ruled admissible. The latter case was cited, with apparent approbation, by Justice WHEELER, in delivering the opinion of the court in *George* vs. *Thomas*. It was not pretended in either of these cases, that the declartion were a part of the *res gestae*.

"Evidence of the character, except when it was a part of the original *res gestae*, was not *admissible at common law* to prove the boundaries of a private estate. Its admission was restricted to cases involving questions of a general or public nature. If the matter in controversy were ancient and not susceptible of better evidence, any proof in the nature of traditionary declarations, whether oral or written, if it appeared that they were made by parties having competent knowledge, was *admissible*, subject to the qualification that it must be a matter of public or general interest.

"The question of the admissibility of this character of evidence, seems to have turned upon the nature of the reputed fact, whether it were of interest to one party only, or to many; If the latter, it was admissible; if the former it was excluded. The tendency of American decisions has been to

break in upon this rule of the common law, in reference to questions of private boundaries, and to remove the restrictions which exclude evidence of this character in such cases. This has been the result of necessity. *Our land marks are usually of perishable materials, and by the settlement and improvement of the country and from other causes, they are constantly being destroyed; it is therefore indispensible in many cases, that hearsay or reputation should be received to establish old boundareis.*"

In *Sasser* vs. *Herring*, the Chief Justice delivering the opinion of the court, said: "We have, in questions of boundary, given to the *single declarations of a deceased individual, as to a line or corner*, the weight of common reputation, and permitted such declarations to be proved under the rule that in questions of boundary hearsay is evidence. *Whether this is within the reason and spirit of the rule is now too late to inquire; it is the well established law of this State* and if the propriety of the rule were now *res integra*, perhaps *the necessity of the case, arising from the situation of our country and the want of self-evident termini of our lands, would require its adoption.*

"There is a strong array of American authority which seem to support the common law rule; but the courts of a majority of the States, it is believed, hold the same doctrine asserted in the cases I have cited."

Welder vs. *Carroll*, 29 T., 333, cites the former cases, and holds that if the locality can be proved by witnesses who can from their personal knowledge or from information derived from general reputation, *or from its having been pointed out to them by the surveyor* by whom it was run, or others who were present at the time or cognizant of the fact, this will fix and mark its position.

In *Evans* vs. *Hunt*, 34 Tex., 113, the court held that the declarations of a surveyor who claimed to have run the line, upon the ground, as to the location of a boundary line, may, after the death of the surveyor, be proved by the witnesses to whom he made the declaration.

In this case the court made a most elaborate examination of the law.

In *Smith* vs. *Russell*, 37 T., 255, a boundary line was proved by the hearsay evidence of Egery. It was sought to reverse the judgment. The English doctrine was relied on by the counsel, and it was urged that in a late case the Texas court seemed inclined to "come back to the English doctrine." But the court in its opinion cites and maintains the former case, saying "*it is a well settled rule* that the declarations of deceased witnesses may be proved to fix the location of corners and lines."

In the case of *Hunt* vs. *Evans*, 49 T., 314, the doctrine is reaffirmed with emphasis.

In *Coleman vs. Smith*, 55 Tex., 254, the declarations of a commissioner who acted as such in making a partition of land, were, after his death, permitted to be given in evidence in regard to the location on the ground of a line established by him in making such partition.

In *Tucker* vs. *Smith*, 68 Texas, 478 (1887), the court say, "it is *well settled* by our decisions, that the declarations of disinterested parties since deceased, who were in a position to know a boundary line are admissible in a controversy about such line."

Some of these cases are reviewed in *Hunnicutt* vs. *Peyton*, 102 U. S., 333, and held not to be opposed to the common law rule which, the court say, excluded the evidence offered in that case.

Such evidence consisted of the testimony of a witness as to what a deceased surveyor had told him as to the location of a certain line of a survey. The court expressly say, that it was to be noticed, that the witness himself had no knowledge of the location, except what the deceased surveyor had told him.

This evidence was very different from that now in controversy, and which consists of the sworn written statement of the very surveyor who had run the survey.

The evidence rejected in the case cited, was a declaration of a deceased party made in the hearing of a single witness, and as such should have been received, if at all, with very great caution.

We submit that the general rule announced by the court as to the inadmissibility of hearsay evidence on the question of the determination of private boundaries, does not cover the evidence offered in the present case. The general observations in the argument of the opinion, should be taken in connection with the particular point before the court.

We do not deem that we are called upon to contradict these general expressions.

It is proper to observe, however, that the case was decided by a court of seven justices, and two of those taking part in the decision, dissented.

In the subsequent case of *Clement* vs. *Packer*, 125 U. S., 310, evidence identical with that admitted in the present case was held by this court to have been properly admitted.

It is true, the court say, that the evidence which consisted of the deposition of a deceased surveyor was, according to the local law, that of Pennsylvania, admissible to prove the location of a disputed boundary line.

They say also, that by the ENLISH rule, evidence of the declarations of deceased persons are inadmissible for the purpose of proving the boundary of a private estate, unless such boundary is identical with another of public interest.

> "In many of the States this strict rule has been extended, and these declarations have been admitted to prove the boundaries of lands of private persons. *This extension of the rule has, we think, been sustained by the weight of authority in the American State courts, as justified upon grounds as strong as those on which the original rule rests.*"

The court further observe, that they do not deem it necessary to lay down any definite rule applicable to all cases, as to when declarations of deceased persons constitute valid evidence to establish private boundaries.

Referring to the case of *Hunnicut* vs. *Peyton*, they say, that even under the summary of the general law in this country "as it was conceived to exist on the subject at that time, the evidence rejected in the present case ought to have been received. It is not necessary for us to approve or disapprove the departures from the original rule, because the court held that the evidence there offered under any well-established exceptions to the rule was not admissible. Whether Moore, whose declarations were of

fered, had made the survey, or had ever been upon its upper line, or on the upper line of the reserve, was proved only by his assertion, which the court allowed to be given in evidence."

But could it be demonstrated that the evidence should not have been admitted, still, taken in connection with the charge of the court, the other evidence, and the prayers given and refused, it does not appear that its admission worked any harm to the defendant, or was such an error as should compel still another trial.

On the merits generally we submit, that the question involved was fairly put before the jury, and that such charge was in exact accordance with the views of this court as announced on the former writ of error.

We give the charge in full and we have italicized that portion to which exception was taken by the defendant, and which constitutes his second exception.

Charge given the Jury.

In this case the defendant admits that plaintiff is entitled to recover unless the Maximo Moreno grant, which defendant owns, and which is an older survey then the Daw's survey, owned by the plaintiff, extends so as to include all or any part of the Daw's survey.

The only issue between the parties is one of boundaries, and the burden of proof is on the defendant to show to your satisfaction that the boundary lines of the Maximo Moreno grant do, in fact, include a portion of the Daw's survey.

These boundaries being thus disputed, the defendant claiming that they do embrace a portion, at least, of the Daw's survey, and the plaintiff contending that said boundaries do not include any portion of that survey, it becomes your duty to fix said boundaries from the proof given you in this case. In considering the proof the rule of law (and of common sense) requires you to follow the tracks of the surveyor on the ground so far as the proof enables you to follow them on the ground with reasonable certainty, and where the surveyor cannot be tracked on the ground you will follow the course and distance he gives in the field notes in the grant so far as these do not conflict with the tracks that you do find that he made and marked on the ground ; and you will constantly bear in mind, in considering the proof in this case, that in fixing the boundaries of a grant the rule requires that course shall control distance as given in the calls of the field notes of the survey, and that marked trees designating a corner or a line on the ground shall control both course and distance. The fact that the lines of the Maximo Moreno grant include more than eleven leagues of land is wholly immaterial, except as a circumstance to aid you in construing or weighing the other proof in the case.

In order to reconcile or elucidate the calls of a survey in seeking to trace and fix the lines upon the ground, you are not required to begin at the corner called for in the grant as the "beginning" corner. The corner so named as the beginning corner does not control more than any other corner actually well ascertained and established, nor are you constrained to follow the calls of the grant in the order that said calls stand recorded in the field-notes, but you may reverse the calls and trace the lines the other way, and should do so if from your view of the proof to so reverse the calls will aid you to so

fix the boundaries of the Maximo Moreno grant as will most nearly harmonize all the calls in the grant with the corners and lines that are established and with the object of the grant.

In reference to the boundaries of the Maximo Moreno grant these points are clearly established and accepted by the parties, namely, the exact location of both of the corners on the San Andres or little river, and the actual location on the ground of the eastern line from the S. E. corner on the course called for in the grant, and a distance several hundred varas further than the distance called for in the grant for this line. The actual location of the other or S. W. corner and the course of the west line also fixes the distance between the east and west lines at any given point, to be measured on the course of the back or north line without regard to the distance called for in the grant as the length of said back or north line. You will perceive that if the proof enables you to fix the true distance for the length of either the west or east line of the survey—that is, to find either of the disputed corners on the ground—that corner will fix the true boundaries of the grant. The original field-notes do not call for any landmarks at the intersection of the west line with the back or north line—that is, at the N. W. corner. At the intersection of the back line with the east line (the line found now to have been plainly marked on the ground by the original surveyor for more than 26,400 varas, the distance called for in the field-notes for said line)two small hackberries are called for to serve for landmark for the corner on this line. There has been proof given you tending to show the point on this line where the two small hackberries called for as a landmark for this N. E. corner actually stood, and if the proof satisfies you as to the point on said east line where said hackberries stood you will fix the boundaries of the grant by a line run

from that point N. 70 W. to the west line of said grant, and if said line run N. 70 W. falls south of the Daw's survey (leaving said Daw's survey wholly north of said line) you will find a verdict for the plaintiff in this case; but if the said line N. 70 west cuts the Daw's survey you will find for the defendant.

If, however, in your judgment, the proof in this case is not sufficient to enable you to fix the point where said two hackberries called for in the field-notes of the original surveyor stood, and the proof does not satisfy you that the west and north lines were actually run and measured by the original surveyor, you may fix the north line of this grant in either of these two ways, adopting that one of these two ways which, in your judgment, from the proof will so fix said north line as will most nearly harmonize all the calls of the grant with the corners and lines that are established, namely: You may begin at the S. W. corner on the river and find the northwest corner by the course and distance of the first line, and extend the second line for the north or back line so as to intersect the east line (a line run N. 20, E. from the S. E. corner on the river, or you may begin at the S. E. corner on the river and follow thence the east line N. 20, E. the distance called for in the field-notes for said line 26,400 varas), and as much farther as the proof satisfies you that said line was actually marked on the ground by the original surveyor and at a point beyond which the proof fails to show to your satisfaction that this line was marked by Johnson. You may fix the N. E. corner and thence extend the line N. 70, W. to the west line of said grant as the north or back line of said grant, and if the north or back line as fixed by you does not cut the Daw's survey you will find for the plaintiff; if it does cut said survey you will find for the defendant.

That I may be sure of being understood in my designation of corners, I state that by the S. W. corner I mean the corner opposite the mouth of the Lampasas River and the beginning (or ter mination) on the river of the west line of the grant.

The court gave, in addition to its own general charge, the following charge to the jury, by request of plaintiff's counsel, as follows:

"In seeking to retrace the lines of an old survey on the ground by following the calls in the survey, and discrepancies or inconsistent calls are found, so that the survey may be made in different ways, and it does not certainly appear from the evidence which is the true way, then, because it is the duty of the party claiming under such grant to show and identify his boundaries by satisfactory evidence, the jury should adopt that way which is least unfavorable to the other party, and in this case, if the jury are not satisfied from the evidence where on the ground the two small hackberry trees were located, and if you are not able to locate the north line of the Moreno grant by the calls for creeks contained in the field-notes, then you should locate the said line by course and distance from the marked corners on the river, both of which are undisputed; and if you find from the evidence that the call for distance from one of said corners will place the said north line at a different place than the call for distance from the other corner, and if you are unable to determine from all the evidence with reasonable certainty where the said line was in fact located, you will adopt the method of locating said line which is most favorable to the plaintiff in this case; and if, in locating the said line, you find that the Daw's survey claimed by Watson is not included within the bounds of the Moreno grant claimed by defendant, you will find for the plaintiff; otherwise for the defendant."

The giving of this additional charge constitutes the third exception.

In the absence of any brief for the plaintiff in error, it is impossible to say upon what ground it will be contended that the charge was in any respect erroneous.

The main charge stated the only rule which the jury could properly follow to ascertain the northern line of the Moreno grant, if the proof should fail to satisfy them where the two hackberries stood.

When the case was here before, this court expressly ruled, that if the testimony was not sufficient to identify the two hackberries and could not fix the northeast corner, nor the back line by any other marks or monuments, the jury could fix it by the courses and distances of the first and second lines of the survey.

Besides, the court below at the trial now in question, at the request of the defendant, charged the jury as follows:

> "If the proof satisfies you that there are old blazes along the east line above the hackberries, and that such blazes extend to a distance of about 4,000 varas to the point of intersection with the course of the north or back line as run from the northwest corner as established by its calls, and that such back or north lines is also marked with old blazes, and that these lines were so run and marked by the original surveyor in 1833, then, in that case you will find for the defendant." R. 31.

The additional charge given at the request of the plaintiff, only announced, in more detail the obligation, which it is conceded, rested on the defendant, to show that his grant embraced the whole, or a portion of that sued for by the plaintiff.

The fourth exception is to the refusal of the court to charge, at request of defendant, as follows:

> "If the proof does not satify you that the two hackberries have been identified as the same which were marked by the original surveyor for the northeast corner of the Moreno survey, then if they believe from the evidence that the western and the northern lines were run according to the field-notes, they should find for the defendant."

This request was properly refused. The court, in its main charge throughout had correctly stated the guides the jury should follow.

They had been informed that they should follow the tracks on the ground so far as the proof enabled them. That where the surveyor could not be tracked on the ground, they should follow the course and distance he gives in the field-notes in the grant, so far as these do not conflict with the tracks that they find he made and marked on the ground, and that they should constantly bear in mind, that in fixing the boundaries of a grant, the rule requires that course should control distance as given in the calls of the field-notes of a survey.

Nor, we submit, is there any merit in the fifth or sixth exceptions to the refusal of the Court to give the prayers requested.

These requests are as follows:

5. "That if the testimony is not sufficient to identify the two hackberries, said to have been found by Bigham in 1854, with those called for in the field-notes of Maximo Moreno grant as the true northeast corner, as fixed on the ground by the original surveyor in 1833, and if the jury cannot fix the northeast corner nor the back line by any other marks or monuments, then they will fix it by the courses and distances of the first and second lines of the survey, except that the second line of the survey should be extended so as to meet the recognized east line as marked and extended beyond the hackberries."

6. "The jury are charged that the field notes which entered into and formed part of the title originally made to Maximo Moreno are those which are to control them in their findings in respect to the work of the surveyor in the field; that they will not consider any field-notes of a survey purporting to have been made for Sawyer unless the evidence should show that the field-notes last mentioned entered into and were incorporated in the grant made to Moreno, and unless the proof shows that the Sawyer field-notes are those which entered into and formed part of the title to Moreno, then they will disregard them and look only to the field-notes in the title issued to Moreno."

Such requests were properly refused.

They are covered by the main charge of the Court, and that given at the request of defendant.

We submit that the judgment should be affirmed.

W. HALLETT PHILLIPS,
For Defendant in Error.

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Supreme Court of the United States.

FRANK H. AYERS
vs.
A. E. WATSON.
No. 119.

Reply to Brief Filed on Behalf of Plaintiff in Error After Argument.

It is insisted that the admission of the deposition of the surveyor, Johnson, was such error as to call for a reversal of the judgment.

We understand that it was admitted in argument that the fact that the deposition was hearsay, was not sufficient to exclude it as evidence.

The particular objection is made that it was not competent, because Johnson had been examined by the plaintiff in *error on a former trial* of the case. In support of the objection reference is made to *Rutherford* vs. *Geddes*, 4 Wall., 220.

There the court say, the deposition offered in evidence was inadmissible because taken in a different suit to which the defendants, against whom it was offered, were not parties, "*nor were in any manner privies to either party in the former suit, in which the deposition was taken.*"

The same ruling was made in the case of *Tappan* vs. *Beardsley*, 10 Wall., 427, also relied on by plaintiff in error.

The record shows that the deposition now in question was taken in a suit wherein David Ayres was plaintiff and Lancaster was defendant.

It also shows, by the answer of one of the defendants, that the plaintiff in error, Frank H. Ayers, claims title to the tract in question through David Ayres. R. 3.

The deposition, it thus appears, was taken in a suit in which the present plaintiff in error, Frank H. Ayres, was in privity with the plaintiff in that action, David Ayres.

Under the rule stated in the cases relied on by plaintiff in error, the deposition was admissible in the present suit.

The answer of Anderson containing the statement of the derivation of title, was filed in order to compel his landlord and warrantor, Frank H. Ayres, to come in and defend the title.

This Ayres accordingly did and set up title to the land in controversy. Hall, another tenant of Ayres, was also a party defendant. He filed no answer and judgment went against him, as of course. He is, however, joined in the writ of error.

The privity being established, it is not necessary that the parties in the two suits should be identical.

Phil., Wilm. & Balt. R. R. vs. *Howard*, 13 How., 235.

The depositions of Johnson, made as far back as 1880, at a former trial of the present case, were ad-

mitted by the court at the instance of the plaintiff in error.

The deposition which he made on the same subject-matter in the previous suit, and offered by defendant in error, we submit, was equally admissible.

But what does the deposition objected to contain, and what bearing did it have on the determination of the case? That is the real inquiry.

If the subject-matter of the deposition became wholly immaterial in the progress of the cause, its admission cannot support an assignment of error, even if it had been erroneous.

The plaintiff in error recognizes this fact, and endeavors to meet it.

He says that "the erroneous admission of this evidence led the court below into a string of errors."

But when he comes to point out any particular error it will be seen to consist in that portion of the charge of the court which he specifies, as follows:

> "If, however, in your judgment, the proof in this case is not sufficient to enable you to fix the point where said two hackberries called for in the field-notes of the original surveyor stood, and the proof does not satisfy you that the west and north lines were actually run and measured by the original surveyor, you may fix the north line of this grant in either of these two ways, adopting that one of these two ways which, in your judgment, from the proof will so fix said north line as will most nearly harmonize all the calls of the grant with the corners and lines that are established, namely: You may begin at the S. W. corner on the river and find the northwest corner by the course and distance of the first line, and extend the second line for the north or

back line so as to intersect the east line (a line run N. 20, E. from the S. E. corner on the river, or you may begin at the S. E. corner on the river and follow thence the east line N. 20, E. the distance called for in the field-notes for said line 26,400 varas), *and as much farther as the proof satisfies you that said line was actually marked on the ground by the original surveyor and at a point beyond which the proof fails to show to your satisfaction that this line was marked by Johnson.* You may fix the N. E. corner and thence extend the line N. 70, W. to the west line of said grant as the north or back line of said grant, and if the north or back line as fixed by you does not cut the Daw's survey you will find for the plaintiff; if it does cut said survey you will find for the defendant."

The Court had, in a previous portion of the charge, directed the jury as follows; no exception was taken to such part of the charge:

"In order to reconcile or elucidate the calls of a survey in seeking to trace and fix the lines upon the ground, you are not required to begin at the corner called for in the grant as the 'beginning' corner. The corner so named as the beginning corner does not control more than any other corner actually well ascertained and established, nor are you constrained to follow the calls of the grant in the order that said calls stand recorded in the field-notes, but you may reverse the calls and trace the lines the other way, and should do so if from your view of the proof to so reverse the calls will aid you to so fix the boundaries of the Maximo Moreno grant as will most nearly harmonize all the calls in the grant with the corners and lines that are established, and with the object of the grant."

This portion of the charge, it must be admitted,

stated correctly a general rule of law applicable to the case.

The whole deposition of Johnson, objected to, is as follows:

> "That he began the Moreno survey at the southeast corner and ran thence northerly. The north line was then run westwardly, and the third, if run at all, was run southwardly to the river. I am of the opinion that no western line was run at all, but was left open; but the eastern and northern line were run and measured. It was not usual to measure the closing line." (R., 17.)

Nothing said in this deposition, we submit, had any effect upon anything material said by the Court in any portion of the charge excepted to, nor did its admission in any way harm the plaintiff in error. Whether the east line was or was not the first line run, was immaterial, nor as the court charged were the jury obliged to begin at the corner called for in the grant as the "beginning corner."

The questions arising under the conflict of evidence as to the true location of the northern line of the Moreno survey, were properly left to the jury, and the deposition of Johnson did not affect these questions nor add anything to the evidence regarding them.

The points touched in the deposition, were not those upon which the case went off, and we submit that its admission neither affected what the court charged nor what it refused to charge.

W. HALLETT PHILLIPS,
for Defendant in Error.